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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1937

No. 342

C. C. McCOLLUM, TRUSTEE IN BANKRUPTCY OF LOOKOUT PLANING MILLS, PETITIONER,

vs.

HAMILTON NATIONAL BANK OF CHATTANOOGA

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF TENNESSEE

PETITION FOR CERTIORARI FILED AUGUST 24, 1937.

CERTIORARI GRANTED OCTOBER 11, 1937.

BLANK

PAGE

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., AUGUST 17, 1937.

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[fol. 1]

IN CHANCERY COURT OF HAMILTON COUNTY

ORIGINAL BILL—Filed August 20, 1935

To the Honorable J. L. Foust, Chancellor, presiding in Chancery — at Chattanooga, Tennessee:

G. C. McCOLLUM, Trustee in Bankruptcy of Lookout Planing Mills, Complainant,

against

HAMILTON NATIONAL BANK OF CHATTANOOGA, TENNESSEE, a National Banking Association, Organized Under the Laws of the United States, Domiciled at Chattanooga, Hamilton County, Tennessee, Defendant

Complainant respectfully shows and represents unto your Honor:

I

That he is trustee in bankruptcy of the Lookout Planing Mills, a corporation, against which an involuntary petition in bankruptcy was heretofore filed in the United States District Court for the Southern Division of the Eastern District of Tennessee; that at the first meeting of creditors of said bankrupt he was duly elected trustee in bankruptcy of said bankrupt; that he duly qualified as such trustee, and since that time has been and is now acting in the performance of his duty. Complainant has been expressly authorized and directed by the referee in bankruptcy to bring this action.

II

Complainant shows that Section 5197, U. S. Revised Statutes, 12 U. S. C. A., Section 85 provides, with respect to associations organized under the National Banking Act, that:

"Any association may take, receive, reserve and charge on any loan or discount made, or upon any note, bill of ex-
[fol. 2] change or other evidences of debt, interest at the rate allowed by the laws of the State, Territory, or District where the bank is located, *and no more*," etc.

Section 5198, U. S. Revised Statutes, 12 U. S. C. A., Section 86, provides:

"The taking, receiving, reserving, or charging a rate of interest greater than is allowed by the preceding section, when knowingly done, shall be deemed a forfeiture of the entire interest which the note, bill or other evidence of debt carries with it, or which has been agreed to be paid thereon. In case the greater rate of interest has been paid, the person by whom it has been paid, or his legal representatives, may recover back, in an action in the nature of an action of debt, twice the amount of the interest thus paid from the association taking or receiving the same; Provided, that such action is commenced within two years from the time the usurious transaction occurred."

Complainant now shows unto your Honor that during the past two years the Lookout Planing Mills has paid and the defendant Hamilton National Bank has knowingly taken, received, reserved or charged upon certain loans made by said bank to said Planing Mills an interest or discount rate of seven per cent per annum, compounded monthly on the basis of thirty days to a month, three hundred and sixty days to a year, being a rate of interest greater than six per cent per annum, as allowed by the laws of the state of Tennessee, in willful violation of the provisions of the foregoing statutes. The dates and [fol. 3] amounts of the taking, receiving, reserving or charging of such excessive and unlawful interest by said Hamilton National Bank, and the dates and amounts of payment thereof by said Lookout Planing Mills were as follows, to-wit:

Date		Amount of Loan	Maturity	Interest Paid
Sept. 6, 1933	Int. on	$2,650.00	60 days	$30.92
12,	" "	2,200.00	30 "	12.83
Oct. 13, 1933	" "	2,200.00	32 "	13.68
Nov. 6, 1933	" "	2,650.00	30 "	30.92
Nov. 13,	" "	2,200.00	30 "	12.83
Dec. 13,	" "	2,200.00	30 "	12.83
Dec. 18,	" "	1,550.00	30 "	9.04
Dec. 18,	" "	40,900.00	30 "	238.58
Jan. 3, 1934	" "	2,638.00	60 "	30.77
Jan. 8,	" "	1,300.00	30 "	7.58
Jan. 11,	" "	40,900.00	30 "	239.58
Jan. 26,	" "	40,600.00	30 "	236.84
Feb. 7,	" "	1,300.00	30 "	7.58
Jan. 12,	" "	2,200.00	30 "	12.83
Feb. 12,	" "	2,200.00	30 "	12.83
Feb. 16,	" "	1,550.00	30 "	9.04

Date			Amount of Loan	Maturity	Interest Paid
Jan.	26,	" "	1,550.00	30 days	9.04
Feb.	28,	" "	40,600.00	30 "	236.83
March	6,	" "	2,265.00	60 "	30.46
March	9,	" "	1,266.99	10 "	2.46
March	14	" "	2,200.00	30 "	12.83
March	19	" "	1,266.99	10 "	2.46
March	19	" "	1,512.22	10 "	2.94
March	27	" "	40,600.00	30 "	236.83
March	29	" "	570.00	11 "	5.34
April	7	" "	500.00	15 "	1.46
April	12	" "	2,200.00	30 "	12.83
April	25	" "	40,600.00	30 "	236.83
[fol. 4]					
May	2	Int. on	$2,625.00	30 days	30.46
May	12	" "	1,266.99	10 "	12.83
May	28	" "	40,600.00	30 "	236.83
June	11,	" "	2,200.00	30 "	12.83
June	23,	" "	40,500.00	60 "	472.50
July	2	" "	2,625.00	60 "	30.46
July	11,	" "	2,200.00	30 "	12.83
Aug.	11,	" "	2,200.00	30 "	12.83
Aug.	23,	" "	40,500.00	30 "	236.25
Aug.	29,	" "	2,625.00	60 "	30.46
Sept.	8,	" "	2,200.00	30 "	12.83
Sept.	22,	" "	40,500.00	30 "	236.25
Oct.	8,	" "	2,200.00	30 "	12.83
Oct.	22,	" "	40,500.00	30 "	236.25
Oct.	29,	" "	2,625.00	60 "	30.46
Nov.	8,	" "	2,200.00	30 "	12.83
Nov.	20,	" "	40,500.00	60 "	236.25
Dec.	7,	" "	2,200.00	30 "	12.83
Dec.	24,	" "	40,500.00	11 "	86.63
Dec.	31,	" "	2,600.00	60 "	30.33
Jan.	2, 1935	" "	40,500.00	30 "	236.25
Jan.	4,	" "	2,200.00	30 "	12.83
Feb.	5,	" "	40,500.00	30 "	236.25
Feb.	[illegible]	" "	238.21	30 "	1.96
Feb.	5,	" "	2,200.00	30 "	12.83
Feb.	26,	" "	2,600.00	60 "	30.33
March	1, 1935	" "	40,500.00	30 "	236.25
March	7	" "	2,200.00	30 "	12.83
April	3	" "	40,500.00	30 "	236.25
April	6	" "	2,200.00	30 "	12.83
April	11	" "	472.50	30 "	2.79
[fol. 5]					
April	26	Int. on	$2,600.00	30 days	15.17
May	6	" "	2,200.00	30 "	12.83
May	11	" "	344.50	30 "	2.01
May	27	" "	2,600.00	30 "	15.17
June	5	" "	2,200.00	30 "	12.83
June	25	" "	2,600.00	30 "	15.17
July	6	" "	2,200.00	30 "	12.83
					$4,822.13

Complainant further shows that since September 12, 1933 said Lookout Planing Mills has paid, and said Hamilton National Bank has knowingly taken, received, reserved or charged a rate of eight per cent per annum, compounded

monthly on the basis of thirty days to a month, three hundred and sixty days to a year, being a rate of interest greater than six per cent per annum, as allowed by the laws of the State of Tennessee, in willful violation of the provisions of the foregoing statutes, upon a loan of $2,300.00, made by said bank to said Lookout Planing Mills. The dates and amounts of the taking, receiving, reserving or charging of such excessive and unlawful interest by said bank, and the payment of such amounts by said Lookout Planing Mills were as follows, to-wit:

Date	Interest Paid
Sept. 12, 1933	$15.33
Oct. 13,	15.33
Nov. 13,	15.33
Dec. 13,	15.33
Jan. 13, 1934	15.33
Feb. 12,	15.33
March 14,	15.33
April 12,	15.33
May 12, 1934	15.33
June 11,	15.33
[fol. 6]	
July 17,	15.33
Aug, 4,	15.33
Sept. 8,	15.33
Oct. 9,	15.33
Nov. 8,	15.33
Dec. 7,	15.33
Jan. 5, 1935	15.33
Feb. 5,	15.33
March 7,	15.33
April 6,	15.33
May 6,	15.33
June 5,	15.33
July 5,	15.33
	$352.59

Complainant further shows that since October 17, 1933, said Lookout Planing Mills has paid, and said Hamilton National Bank has knowingly taken, received, reserved or charged a rate of eight per cent per annum, compounded monthly on the basis of thirty days to a month, three hundred and sixty days to a year, being a rate of interest

greater than six per cent per annum, as allowed by the laws of the State of Tennessee, in willful violation of the provisions of the foregoing statutes, upon a loan of $415.00, made by said bank to said Lookout Planing Mills. The dates and amounts of the taking, receiving, reserving or charging of such excessive and unlawful interest by said bank, and the payment of such amounts by said Lookout Planing Mills were as follows, to-wit:

Date	Interest Paid
Oct. 17, 1933	$5.53
Dec. 13,	5.53
Feb. 12, 1934	5.53
April 12,	5.53
June 11,	5.53
[fol. 7]	
Aug. 4, 1934	$5.53
Oct. 9,	5.53
Dec. 3,	5.53
Feb. 8, 1935	5.53
April 3,	5.53
June 3,	5.53
	$60.83

Complainant is advised and avers that, under the facts hereinabove set forth, he is entitled to recover in this action twice the total amount of interest thus paid, $5,235.55, or $10,471.10, with interest from the date of the bringing of this suit.

III

Premises considered, complainant prays:

(1) That process issue requiring the defendant to appear and answer this bill at the earliest practicable rule day, but not under oath.

(2) Upon the hearing let complainant, as trustee in bankruptcy of the Lookout Planing Mills, have a decree against the defendant Hamilton National Bank for said sum of $10,471.10, with interest from the date of the bringing of this suit.

(3) Let Complainant have such other, further and general relief as in equity he may be entitled to.

Rankin, Frazier & Roberts, Thompson & Ballard,
Solicitors for Complainant.

[fol. 8] IN CHANCERY COURT OF HAMILTON COUNTY

DEMURRER—Filed September 26, 1935

Comes defendant, Hamilton National Bank, and demurs to the bill in this cause:

I

Because the complainant, as Trustee in Bankruptcy, seeks to recover the penalty of double the interest paid by the bankrupt within two years, provided by Section 5198, United States Revised Statutes, Sec. 86, Title 12, U. S. C. A., whereas the Trustee in Bankruptcy is not the legal representative of the bankrupt, and has no right, power or authority to maintain this action and recover said penalty.

II

Because the bill seeks to recover the penalty provided by Section 5198, United States Revised Statutes, Section 86, Title 12, U. S. C. A., and said penalty does not constitute assets or property recoverable by a Trustee in Bankruptcy.

III

Because the Bill fails to show any beneficiary entitled to take and share in the recovery sought.

Cantrell, Meacham & Moon, Solicitors for Defendant.

IN CHANCERY COURT OF HAMILTON COUNTY

[Title omitted]

ORDER AMENDING BILL—October 5, 1935

In this cause upon motion of the complainant the bill heretofore filed by him is amended by adding at the end of the first section thereof the following words, to-wit:

"Said Lookout Planing Mills were largely indebted at the time of the filing of said involuntary petition in bank-
[fol. 9] ruptcy and complainant brings this action for the use and benefit of the creditors of such bankrupt corporation; that the creditors of said bankrupt hold claims against the bankrupt greatly in excess of the assets of the bankrupt

which have come into his hands, or which may come into his hands, together with the amount of penalty herein sought to be recovered, and that these creditors are the direct beneficiaries of the sums sought in this suit."

The demurrer heretofore filed shall stand as to the bill as amended.

IN CHANCERY COURT OF HAMILTON COUNTY

MEMO—Filed November 21, 1935

This is a suit by C. C. McCollum, Trustee in Bankruptcy for the Lookout Planing Mills, Bankrupt, against the Hamilton National Bank under section 5198 of the Revised Statutes of the United States, said section being in the words and figures, following, to-wit:

"The taking, receiving, reserving, or charging a rate of interest greater than is allowed by the preceding section, when knowingly done, shall be deemed a forfeiture of the entire interest which the note, bill, or other evidence of debt carries with it, or which has been agreed to be paid thereon. In case the greater rate of interest has been paid, the person by whom it has been paid, or his legal representatives, may recover back, in an action in the nature of an action of debt, twice the amount of interest thus paid from the association taking or receiving the same, provided such action is commenced within two years from the time the usurious transaction occurred. That suits, actions, and proceedings against any association under this title may be had [fol. 10] in any circuit, district or territorial court of the United States held within the district where such association may be established, or in any State, county, or municipal court in the county or city in which said association is located having jurisdiction in similar cases."

The bill alleges that the Hamilton National Bank, within two years next before the filing of the suit in this cause, collected from the Lookout Planing Mills, the bankrupt, $5,235.50 and the suit seeks to recover double said amount with interest from the date of the filing of said suit.

The Hamilton National Bank, defendant, filed a demurrer and sets up three grounds of demurrer. The first ground of demurrer is as follows:

"That a Trustee in Bankruptcy is not a legal representative within the contemplation of the Banking Act."

This ground of demurrer raises the question of whether or not a Trustee in Bankruptcy is a legal representative of the bankrupt. The statute above quoted, Section 5198 of the Revised Statutes, provides that:

"In case the greater rate of interest has been paid, the person by whom it has been paid, or his legal representatives, may recover back in an action in the nature of an action of debt, twice the amount of interest thus paid from the assocoation taking or receiving the same, provided such action is commenced within two years from the time the usurious transaction occurred."

The part of the Acts of Bankruptcy necessary to be quoted, is as follows (Collier on Bkrptcy., 13 Ed. Vol. 2, 1039):

[fol. 11] "As to all property in the custody or coming into the custody of the bankruptcy court, shall be deemed vested with all the rights, remedies, and powers of a creditor holding a lien by legal or equitable proceedings thereon; and also, as to all property not in the custody of the bankruptcy court, shall be deemed vested with all the rights, remedies, and powers of a judgment creditor holding an execution duly returned unsatisfied."

It will be observed from the above quotation that—

"As to all property not in the custody of the bankruptcy court (but the Trustee) shall be deemed vested with all the rights, remedies, and powers of a judgment creditor holding an execution duly returned unsatisfied."

This quotation, last above, was not in the bankrupt law until 1910. There was much confusion in the decisions as to the status of a Trustee in Bankruptcy prior to the amendment in 1910. This amendment placed the Trustee in the position of a judgment creditor with return of nulla bona as to all property not in the hands of the Trustee. The court is of the opinion that whatever might have been the status of the Trustee prior to said amendment, it seems clear to the court after said amendment the Trustee was not in the position of legal representative of the bankrupt, but was in the position of an adversary, namely, a judgment creditor.

"By the terms of said section 5198 the relief granted is confined to the debtor or his legal representatives, to be obtained by either only in an action in the nature of an action of debt commenced within two years from the time the usurious transaction occurred.

"It does not, therefore, extend to the creditor of the [fol. 12] debtor, as he is in no sense the debtor's legal representative, nor does it give to the creditor an action in equity to subject the forfeiture to the satisfaction of his debt.

"The right not being given, it cannot be supplied by intendment. No latitude of construction is permissible of a statute providing a forfeiture as a penalty for its violation and a remedy for recovery. He who seeks to recover the amount forfeited must be the person authorized to sue, and must bring the action provided for. No other can have the redress, nor can it be obtained in any other action.

"These are familiar principles, and need no citation of authority to sustain them."

Barrett v. Bank, 85 Tenn. 428.

The Supreme Court of Tennessee in this decision holds that the right to recover double the interest paid is the right to recover on a forfeiture and not a right to recover usury paid. They draw a sharp distinction between a suit to recover usury paid and one to recover a forfeiture.

The question of the right of the Trustee in Bankruptcy to recover usury under the laws of Tennessee is not involved in this suit because this is a suit, as above stated, for a forfeiture, and the Trustee in Bankruptcy, being in the position of a judgment creditor, could not under this holding be treated as a representative of the debtor.

The first ground of demurrer will, therefore, be sustained.

The second ground of demurrer is:

"That the penalty of twice the interest collected is not property of the bankrupt, recoverable for the use and benefit of the creditors."

[fol. 13] This ground of demurrer will be overruled for the present with leave to rely on same at the hearing.

The third ground of demurrer was disposed of by an amendment and it has, therefore, been eliminated.

J. L. Foust, Chancellor.

IN CHANCERY COURT OF HAMILTON COUNTY

[Title omitted]

DECREE ON DEMURRER—November 25, 1935

(1) The demurrer of the defendant Hamilton National Bank to the bill came on to be heard before the Honorable J. Lon Foust, Chancellor, and upon considering the first ground thereof, wherein the defendant challenged the right of the complainant to bring the suit on the ground that the trustee in bankruptcy is not the legal representative of the bankrupt, the Court is of opinion that said ground of demurrer is well taken, and the same is accordingly sustained.

And to the action of the Court in sustaining said ground of demurrer the complainant excepts.

(2) The Court is pleased to and does for the present overrule and disallow the second ground of demurrer interposed by the defendant, wherein the defendant avers that the recovery sought by the complainant under Section 5198, U. S. Revised Statutes, Section 86, Title 12, U. S. C. A., does not constitute assets or property recoverable by a trustee in bankruptcy; but the defendant is granted leave to rely upon the ground of demurrer at the hearing.

(3) The third ground of the demurrer interposed by the [fol. 14] defendant has been fully met by the amendment heretofore offered by the complainant and allowed by the Court, and the same is accordingly overruled and disallowed.

The defendant is granted twenty days from this date, November 22, 1935, in which to file its answer.

IN CHANCERY COURT OF HAMILTON COUNTY

ANSWER AND CROSS BILL—Filed December 11, 1935

Defendant, Hamilton National Bank of Chattanooga, not waiving its right to insist upon a decree dismissing the bill in this cause based upon the Court's action in sustaining the first ground of the demurrer; and not waiving the second ground of the demurrer, overruled with leave to

rely on same at the hearing, but expressly relying thereon; for answer to the bill of complaint, says:

I

It is not liable for the penalty sued for, and complainant is not entitled to recover said penalty. In any event, at the time complainant's action was commenced Lookout Planing Mills, in bankruptcy, was indebted to it, by note dated May 1, 1935, due six months after date, for an unpaid balance of $19,994.20; by note dated July 5, 1935, due thirty days after date, for $2,200.00; by note dated June 29, 1935, due thirty days after date, for $66.50; as endorser of note of J. C. Miller dated July 5, 1935, due thirty days after date, for $2,300.00; as endorser of note of C. O. Stephens dated June 1, 1935, due thirty days after date, for an unpaid balance of $394.00; as endorser of note of P. E. Groves dated July 10, 1935, due thirty days after date, for an unpaid balance of $124.00; as endorser of note of Sarah E. Goodner and Sam D. Goodner dated June 1, 1935, due sixty days after date, for $415.00; or an aggregate of $25,493.70, which it hereby offers to set off against complaintnt's demand, and which it is entitled to have credited upon or allowed as a set off against any recovery of complainant, [fol. 15] and defenddant pleads the right of set off.

True and correct copies of the notes evidencing the aforesaid items of indebtedness are filed herewith as Exhibit A and made a part hereof, but not for copy in issuing process. The original notes will be filed on or before the hearing, if necessary.

II

All material allegations of the bill not hereinbefore admitted or denied are here and now generally denied.

And now, having fully answered, and being advised that on the facts by the Bank hereinbefore alleged, it is entitled to relief, it assumes the character of cross-complainant, and prays:

1st. That proper process issue to compel complainant to come into this Court and answer this cross-bill, but answer on oath is hereby waived.

2nd. That Lookout Planing Mills, for the purpose of set-off against any recovery on the part of complainant (Cross defendant), be adjudged and decreed to be indebted to

cross-complainant in the sum of $25,493.70, the aggregate amount of the notes aforesaid, together with accrued interest, and that it be allowed to set off the amount of its said claim against any recovery complainant (cross-defendant) may have against it.

3rd. That cross-complainant have such other, further and general relief as the nature of its case may require.

Hamilton National Bank of Chattanooga, by C. W. K. Meacham, Solicitor. Cantrell, Meacham & Moon, Solicitors.

We acknowledge ourselves security for costs incident to cross-bill.

[fol. 16] C. W. K. Meacham. W. D. Moon.

Subject to all exceptions, we enter the appearance of defendant McCollum, Trustee, in bankruptcy of Lookout Planing Mills, and waive service of process on him. We acknowledge receipt of a copy of the foregoing cross-bill.

December 11, 1935.

Thompson & Ballard, Solrs. for McCollum, Trustee.

IN CHANCERY COURT OF HAMILTON COUNTY

ANSWER TO CROSS BILL—Filed December 13, 1935

Comes the defendant C. C. McCollum, trustee in bankruptcy of Lookout Planing Mills, and for answer to so much and such parts of the cross-bill filed against him herein by the defendant Hamilton National Bank as he is advised it is material or necessary for him to answer, says:

This cross-defendant is advised and avers that his right of action, as set forth in his original bill herein, is conferred by Sections 5197, 5198, U. S. Revised Statutes, and Sections 85, 86 of the United States Code Annotated; that the rights and remedies conferred thereby are exclusive, and under the terms thereof his right to recover the penalty therein provided is not subject to the payment of any obligation or obligations of the Lookout Planing Mills to it; and the amounts of usurious interest paid by the Lookout Planing Mills to the Hamilton National Bank, and the amount which cross-defendant is entitled to recover under the sections of the

statute hereinabove referred to, cannot be applied as a credit, or credits, upon the balance owing upon any obligation or obligations of the Lookout Planing Mills to cross-complainant Hamilton National Bank; nor can any part of such amount owing by Lookout Planing Mills to said Hamilton National Bank be set off against any amount due cross-defendant under said statute, nor against any recovery [fol. 17] which he may obtain herein, as trustee in bankruptcy of said Lookout Planing Mills.

All allegations contained in said cross-bill not hereinabove admitted or denied are here and now denied and strict proof thereof required, if deemed material.

And now, having fully answered said cross-bill, this cross-defendant prays hence to be dismissed.

Thompson & Ballard, Joseph B. Roberts, Solicitors for Cross-Defendant; C. C. McCollum, Trustee in Bankruptcy of Lookout Planing Mills.

IN CHANCERY COURT OF HAMILTON COUNTY

DEPOSITIONS OF C. H. McCOLLUM AND WALTER ILER—Filed January 8, 1936

The depositions of C. H. McCollum and Walter Iler, witness on behalf of the complainant herein, taken by agreement of parties at the offices of Frazier & Roberts, Volunteer Building, in the City of Chattanooga, County of Hamilton and State of Tennessee on the 17th day of December, 1935, in the presence of J. W. Thompson, Esq., J. B. Roberts, Esq., Solicitors for Complainants, C. W. K. Meacham, Esq., Solicitor for Defendant.

It being agreed that Chas. M. Fain, Notary Public and Shorthand Reporter, may swear the witnesses, take their depositions in shorthand, afterwards reducing same to typewriting, when they may be used on the hearing of said cause, subject along to exceptions for competency, materiality or relevancy, which may be made on the hearing; all formalities as to notice, caption, certificate, transmission, etc., including the signatures of the witnesses to their respective depositions, being expressly waived.

[fol. 18] The said C. H. McCollum, called as a witness on behalf of the complainant, being duly sworn, deposed:

Direct examination.

Questions by J. W. Thompson, Esq.:

Q. 1. Are you Mr. C. C. McCollum, complainant in this cause?

A. My name is C. H. McCollum.

Q. 2. Were you appointed Trustee in Bankruptcy in the estate of the Lookout Planing Mills?

A. Yes, sir.

Q. 3. Did you qualify by giving bond as required in that cause?

A. Yes, sir.

Q. 4. After your appointment and qualification, I will ask you if you filed a petition in the bankruptcy proceedings, setting forth certain matters with respect to the charge and receipt of usury by the Hamilton National Bank and praying authority to bring this suit?

A. Yes, sir.

Q. 5. Do you remember whether or not the Referee entered an order in that case, authorizing the bringing of this suit?

A. Yes, sir.

Q. 6. I will ask you if you will file as exhibits to your deposition the following certified copies: As Exhibit "A", copy of order appointing Sam J. McAllester referee in bankruptcy; as Exhibit "B", copy of bond of Sam J. McAllester as Referee in Bankruptcy, and order of the Judge of the United States District Court approving the same; as Exhibit "C", copy of order adjudicating the Lookout Planing Mills a bankrupt; as Exhibit "D" copy of order appointing you as Trustee in Bankruptcy of the Lookout Planing Mills; as Exhibit "E", copy of order approving your bond as such Trustee, as Exhibit "F", copy of your petition for authority to sue the Hamilton National Bank; and as Exhibit "G" copy of order authorizing this suit against the Hamilton National Bank? Will you do that?

[fol. 19] A. Yes, It will be all right to have them just certified by the Referee, will it?

Mr. Thompson: We will obtain the certified copies in accordance with the requirements.

(Said Certified Copies filed herewith, marked respectively, Exhibits "A", "B", "C", "D", "E", "F" and "G".)

Q. 7. Now, Mr. McCollum, do you know whether or not a large amount of claims have been filed in the bankruptcy proceeding?

A. I do not know the exact number, but I think there have been quite a number filed.

Q. 8. Have you any idea of the amount of claims that have been filed at this time?

A. Not unless I checked the bankruptcy records.

Q. 9. Will you check the bankruptcy records and state in answer to this question the total amount of claims which have now been filed in that bankruptcy proceeding, both secured and unsecured, stating the individual claims and the amount of each claim?

A. Yes, sir.

(Said information called for in the question last above, being furnished in tabulated form, received in evidence, attached hereto, marked Exhibit "H".)

Mr. Thompson: Ask him.

Mr. Meacham: I do not care to ask him.

Further this Deponent Saith Not.

Sworn to and signature waived before me on the 17th day of December, 1935. Chas. M. Fain, Notary Public. (Seal.)

[fol. 20] Be it Remembered, That a District Court of the United States begun and held for the Southern Division of the Eastern District of Tennessee, at the Federal Court Rooms in the City of Chattanooga, within said District and the Sixth Circuit, on the Fourth Monday, it being the 23rd day of April, A. D. 1934.

Present and presiding the Honorable Geo. C. Taylor, Judge of the United States District Court for the Eastern District of Tennessee.

The following proceedings were had, to-wit:

Thursday, June 21st, 1934.

Court Met Pursuant to Adournment

Presiding at Chambers, the Honorable George C. Taylor, Judge, etc.

[fol. 21] Sam J. McAllester.

Subscribed and sworn to before me this 21st day of June, 1934. Geo. E. Gresham, D. C. (Seal.)

[fol. 22] EXHIBIT "A" TO DEPOSITION OF C. H. MCCOLLUM

Filed Jan. 8, 1936, Sam Erwin, C. & M., by E. N. Bridges, D. C. & M.

Filed Apr. 25, 1936, S. E. Cleage, Clerk.

Filed 21st day of June 1934, Ent'd Min. Bk. pp. 807. Lee A. Beeler, Clerk, by Jas. H. Liles, Dep. Clk.

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TENNESSEE

In the Bankruptcy Court at Chattanooga, Tennessee

In the Matter of SAM J. MCALLESTER, ESQ., Referee in Bankruptcy

By virtue of and under the authority of Section 34, Acts of Congress, to establish a uniform system of bankruptcy throughout the United States, the Court hereby designates and appoints Sam J. McAllester, Esq., of Chattanooga, Tennessee, as Referee in Bankruptcy in and for all the counties in the Southern Division of the Eastern District of Tennessee for a term of two years from and after the ninth day of July, 1934, to hold said office in accordance with provisions of said Bankruptcy Act. He will on or before said date, and before assuming the duties of said office under his appointment, qualify by entering into bond to the United States in the sum of $2,500.00, with at least two sureties to be approved by the Court, conditioned for his faithful performance of his official duties and by taking the oath of office prescribed by the said Bankruptcy Act

and delivering the same to the Clerk to be preserved among the files of the Court.

Approved for entry.

Geo. C. Taylor, Judge.

Filed June 21st, 1934, Lee A. Beeler, Clerk, by Jas. H. Liles, Dep. Clk.

In the Matter of SAM J. MCALLESTER, ESQ., Referee in Bankruptcy

REFEREE'S OATH OF OFFICE

I, Sam J. McAllester, do solemnly swear that I will administer justice without respect to persons, and do equal right to the poor and to the rich, and that I will faithfully and impartially discharge and perform all the duties incumbent on me as Referee in Bankruptcy, according to the Constitution and laws of the United States. So Help Me God.

[fol. 23] EXHIBIT E TO DEPOSITION OF C. H. MCCOLLUM

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TENNESSEE, SOUTHERN DIVISION

BOND OF REFEREE

Know All Men by These Presents; That we, Sam J. McAllester, of Chattanooga, Tennessee, as principal, and W. A. Sadd of Chattanooga, Tennessee, and Silas Williams of Chattanooga, Tennessee, as sureties, are held and firmly bound to the United States of America, in the sum of Twenty Five Hundred and No/100 Dollars ($2,500.00), to be paid to the said United States, to which payment, well and truly to be made, the said C. H. McCollum hereby binds himself, his heirs, executors and administrators, and the Fidelity and Deposit Company of Maryland binds itself, its successors and assigns, firmly by these presents. Signed with their names and sealed with their seals the 15th day of August, 1935.

The condition of this obligation is such, that whereas the above named C. H. McCollum was, on the 15th day of August, A. D. 1935,, appointed Trustee in the case pending

in Bankruptcy in said Court, wherein Lookout Planing Mills is the bankrupt, and he, the said C. H. McCollum has accepted said trust with all the duties and obligations pertaining thereunto.

Now, Therefore, if the said C. H. McCollum as aforesaid, shall obey such orders as said Court may make in relation to said trust, and shall faithfully and truly account for all the moneys, assets, and effects of the estate of said bankrupt which shall come into his hands and possession, and shall in all respects faithfully perform all of his official duties as said Trustee then this obligation to be void; otherwise to remain in full force and virtue.

C. H. McCollum. (Seal.) Fidelity and Deposit Company of Maryland, by N. S. Sloan, Its Attorney in Fact. (Seal.)

[fol. 24] In the Matter of Lookout Planing Mills, Bankrupt

It appearing to the Court that C. H. McCollum of Chattanooga, Tennessee, and in said district, has been duly appointed Trustee of the estate of the above named bankrupt, and has given bond with sureties for the faithful performance of his official duties, in the amount fixed by the creditors (or by order of Court) to wit: the sum of Twenty Five Hundred ($2500.00) Dollars, it is ordered that said bond be, and the same is hereby approved.

Sam J. McAllester, Referee in Bankruptcy.

Filed Jan. 8, 1936, Sam Erwin, C. & M., by E. W. Bridges, D. C. & M.

Filed Apr. 25, 1936, S. E. Cleage, Clerk.

[fol. 25] Exhibit "F" to Deposition of C. H. McCollum

Filed Jan. 8, 1936, Sam Erwin, C. & M., by E. W. Bridges, D. C. & M.

Filed Apr. 25, 1936, S. E. Cleage, Clerk.

Filed Aug. 23, 1935, Sam J. McAllester, Referee.

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DIVISION OF THE EASTERN DISTRICT OF TENNESSEE

In Bankruptcy. No. 9220

In the Matter of LOOKOUT PLANING MILLS, Bankrupt

PETITION OF TRUSTEE FOR AUTHORITY TO BRING SUIT AGAINST HAMILTON NATIONAL BANK AND ORDER THEREON

To the Honorable Sam J. McAllester, Referee:

Your petitioner, C. C. McCollum, Trustee, respectfully shows and represents unto your Honor:

I

That he was on August 15, 1935, elected as trustee of the above named bankrupt; that he duly qualified by giving bond as required, and is now acting as such trustee.

II

Your petitioner is advised and verily believes that during the past two years the bankrupt has paid to the Hamilton National Bank an amount in excess of $5,000.00 in the way of usurious charges upon loans made by said bank to the bankrupt, in violation of Sections 5197 and 5198 of U. S. Revised Statutes, 12 U. S. C. A., Sections 85 and 86. Your petitioner is advised that under the express provisions of section 5198, U. S. Revised Statutes, Section 86; U. S. C. A., he is entitled to recover back in an action of debt twice the amount of interest thus paid upon the Hamilton National Bank so taking or receiving the same.

[fol. 26] Wherefore, your petitioner prays that he be authorized to bring proper action against said Hamilton National Bank for the purpose of recovering the penalty provided in said Statute, and that he may employ the law firms of Frazier & Roberts and Thompson & Ballard for this purpose. Your petitioner shows that these firms have considered the facts in connection with the proposed action; they are qualified to represent your petitioner and creditors therein, and your petitioner verily believes that it is manifestly to the advantage of the bankrupt estate that the action prayed be taken herein.

C. H. McCollum, Petitioner.

STATE OF TENNESSEE,
County of Hamilton, ss:

C. C. McCollum, being first duly sworn, states that he has read his foregoing petition and that the facts therein stated are true to the best of his knowledge, information and belief.

C. H. McCollum.

Subscribed and sworn to before me, this 23 day of August, 1935. Sam J. McAllester, Referee.

[fol. 27] EXHIBIT "G" TO DEPOSITION OF C. H. MCCOLLUM

Filed Jan. 8, 1936, Sam Erwin, C. & M., by E. W. Bridges, D. C. & M.
Filed Apr. 25, 1936, S. E. Cleage, Clerk.
Filed Aug. 23, 1935, Sam J. McAllester, Referee.

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TENNESSEE, SOUTHERN DIVISION

In Bankruptcy. No. 9220

In the Matter of LOOKOUT PLANING MILLS, Bankrupt

ORDER.

This matter coming on for consideration before the Honorable S. J. McAllester, Referee, upon the petition of C. C. McCollum, Trustee, asking authority and direction to bring a suit against the Hamilton National Bank for the purpose of recovering twice the amount of interest paid by the Lookout Planing Mills to said Hamilton National Bank during the past two years, and for authority to employ the law firms of Rankin, Frazier & Roberts and Thompson & Ballard, for this purpose, and it appearing to the court that it is manifestly to the advantage of the estate that such action be brought and that the trustee employ said firms of attorneys for this purpose, it is

Ordered, Adjudged and Decreed that C. C. McCollum, trustee of the above named bankrupt, be and he hereby is authorized and directed to institute proper action for the purpose of recovering twice the amount of interest paid

during the past two years by the Lookout Planing Mills to the Hamilton National Bank; and he is likewise authorized and directed to employ the law firm of Rankin Frazier & Roberts and Thompson & Ballard for the purpose of bringing such action.

Dated Chattanooga, Tennessee August 23, 1935.

Sam J. McAllester, Referee.

[fol. 28] THE UNITED STATES OF AMERICA,
Eastern District of Tennessee,
Southern Division, ss:

I, Lee A. Beeler, Clerk of the District Court of the United States within and for the District aforesaid, do hereby certify that the foregoing printing and typewriting is a true, full, correct, and complete copy of the original Order appointing Sam J. McAllester, Esq., Referee in Bankruptcy, Referee's Bond, Order of Adjudication of Lookout Planing Mills; Trustee's Bond, Order approving the same Trustee's petition to institute suit, etc., Order granting such lease, on file and remaining of record in my office in the matter of Lookout Planing Mills, No. 9220 in Bankruptcy.

In Testimony Whereof, I have hereunto set my hand and seal of the said District Court, at Chattanooga, Tennessee, this 4th day of January, A. D. 1936.

Lee A. Beeler, Clerk, by Jas. H. Liles, Deputy Clerk.
(Seal.)

THE UNITED STATES OF AMERICA,
Eastern District of Tennessee, ss:

I, Geo. C. Taylor, Judge of the District Court of the United States, within and for the District aforesaid, the same being a court of record, within and for the district aforesaid, do hereby certify that Lee A. Beeler is clerk of said Court, and was such clerk at the time of making and subscribing to the foregoing certificate attached to certified copy of the records described above, in the matter of Lookout Planing Mills, No. 9220, and that the attestation of said Clerk by Jas. H. Liles, Deputy Clerk, is in due form of law and by the proper officer.

In Testimony Whereof, I do hereby subscribe my name at Knoxville, Tennessee, this 6th day of January 1936.

Geo. C. Taylor, Judge of the District Court of the United States, Eastern District of Tennessee.

[fol. 29] THE UNITED STATES OF AMERICA,
Eastern District of Tennessee,
Southern Division, ss:

I, Lee A. Beeler, Clerk of the District Court of the United States, within and for the District aforesaid, do hereby certify that Geo. C. Taylor, whose name is subscribed to the foregoing certificate, was, at the time of subscribing the same, Judge of the District Court, within and for the District aforesaid, duly commissioned and qualified, and that full faith and credit are due to all his official acts as such.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Court, at Chattanooga, Tennessee, this — day of January, 1936.

Lee A. Beeler, Clerk, District Court of the United States, Eastern District of Tenn., by Jas. H. Liles, Deputy Clerk. (Seal.)

[fol. 30] The said WALTER W. ILER, called as a witness on behalf of complainant, being duly sworn, testified:

Direct examination.

Questions by J. W. Thompson, Esq.:

Q. 1. Mr. Iler, what official position, if any, did you occupy with the Lookout Planing Mills?

A. Secretary.

Q. 2. For what length of time did you occupy that position?

A. From December 8, 1930, to July 17, 1935.

Q. 3. As such officer of the Lookout Planing Mills, I will ask if you had direct charge of the books of the company?

A. Yes, sir.

Q. 4. I will ask you whether you did nor did not also have direct charge of the making of loans by the company?

A. Yes, sir.

Q. 5. Particularly with loans obtained from the Hamilton National Bank?

A. Yes, sir.

Q. 6. Now, Mr. Iler, I will ask you what your course of dealing was with the bank, with respect to money borrowed directly by the Lookout Planing Mills, from the bank; that is to say, what rate of interest or discount would be charged on that character of loans?

A. Well, it was always figured at seven per cent.

Q. 7. Now, if you had a note of some customer of the Mills, which you wanted to sell or discount, or rediscount, what rate of interest or discount would you be required to pay in those cases?

A. Eight per cent.

Q. 8. To what officer of the bank would you present a loan when it was first negotiated for the purpose of consummating the loans?

A. Mostly to Mr. Arthur McDonald.

Q. 9. Is he a Vice-President of the bank over there?

A. Yes, sir.

Q. 10. Now, Mr. Iler, I will ask you if the counsel who is [fol. 31] now examining you, has obtained the original records of the Lookout Planing Mills, showing "Bills and Account Payable," that is, loans obtained from the Hamilton National Bank and the checks of the Lookout Planing Mills for the last two or three years?

A. Yes, sir.

Q. 11. And they are present here today for your access in event you wish to look to them to answer any question?

Q. 12. Now, Mr. Iler, the first item that is charged in this bill is a loan of $2,650.00 under date of September 6, 1933, it being averred that a loan was made at that time for sixty days, and the interest or discount payment of $30.92. I show you check number 13002 of the Lookout Planing Mills, payable to the order of the Hamilton National Bank, dated September 6, 1933, and ask you if that was the check given by you at that time for the payment of that amount of interest on that loan for that period of time?

A. Yes, sir.

Q. 13. Now, will you look at your records of "Bills Payable", and state whether or not you obtained a loan of $2,650.00 from the Hamilton National Bank at that time, of that amount?

A. Mr. Thompson, that ledger page does not seem to be present. I can tell from the journal page over there.

Q. 14. Will you look at the journal and answer the question?

A. Yes, sir. (After examining journal page.)

Q. 15. I will ask you to make that check Exhibit Number One to your deposition?

A. I do so.

(Said check received in evidence, hereto appended, marked "Exhibit No. 1".)

Q. 16. Now, that was interest at what rate, Mr. Iler?

A. Figured at seven per cent.

Q. 17. The next item on my list is a loan of $2,200.00 under date of September 12, 1933. I show you check No. 13026, [fol. 32] dated September 12, 1933, payable to the Hamilton National Bank, and ask you if that loan was made at that time and if that amount was paid in the way of interest on that date?

Mr. Meacham: I want to interpose an objection to this line of examination, as leading, and the objection is made for that reason.

Objection overruled. Appeal prayed and granted.

Mr. Thompson:

Q. 18. Well, I show you that check, Mr. Iler, and ask you what that represents, and what it was given for?

A. It is stated on the back of the check, "Interest on $2,200.00 for thirty days".

Q. 19. In view of that entry on the back of that check, what was that given for?

A. Given to pay the interest on a note for $2,200.00 for thirty days.

Q. 20. At what rate of interest was that?

A. Seven per cent.

Q. 21. I ask you to make that check Exhibit Number Two to your deposition?

A. I do so.

(Said check, received in evidence, hereto appended, marked "Exhibit No. 2".)

Q. 22. I show you the check of Lookout Planing Mills, No. 13088, dated October 13, 1933, payable to the order of Hamilton National Bank, and ask you to state what that check was given for?

A. On the back of the check it states: "Interest on $2,200.00 for thirty-two days, and Interest on J. C. Miller note." That amount of interest is $13.68, and interest on the J. C. Miller note $16.35.

Q. 23. Now, the interest on the $2,200.00 of $13.68 was figured at what rate?

A. Figured at seven per cent.

[fol. 33] Q. 24. And the other item, the J. C. Miller note interest, at what rate was that figured?

A. Figured at eight per cent.

Q. 25. I will ask you to make that check Exhibit Number Three to your deposition?

A. I do so.

(Said check received in evidence, hereto appended marked "Exhibit No. 3".)

Q. 26. I show you check No. 13118, dated November 6, 1933, payable to the order of the Hamilton National Bank, and ask you for what that was given?

A. That was interest on the $2,650.00 note for sixty days, stated on the back of the check.

Q. 27. At what rate of interest was that figured?

A. Figured at seven per cent.

Q. 28. I ask you to make that Exhibit Number Four?

A. I do so.

(Said check received in evidence, hereto appended marked "Exhibit No. 4".)

Q. 29. I show you check No. 13134 dated November 13, 1933, payable to the order of the Hamilton National Bank in the sum of $28.16, and ask you to look at that check and state what that was given for?

A. That was $12.83 of it, was interest on $2,200.00 for thirty days.

Q. 30. At what rate, please?

A. Seven per cent. And $15.33 interest on the note of J. C. Miller.

Q. 31. At what rate of interest?

A. Eight per cent.

Q. 32. Will you please make that Exhibit Number Five to your deposition?

[fol. 34] A. I do so.

(Said check received in evidence, hereto appended marked "Exhibit No. 5".)

Mr. Meacham: Defendant objects to all these questions because leading, and asks that the same objection apply to all such leading questions of a similar nature and character.

Objection overruled. Appeal prayed and granted.

Mr. Thompson:

Q. 33. I show you check No. 13181, dated December 13, 1933, payable to the order of the Hamilton National Bank in the sum of $12.83, and ask you to state for what that was given, and at what rate of interest it was figured?

A. It was for interest on $2,200.00 for thirty days, figured at seven per cent.

Q. 34. I ask you to make that Exhibit Number Six to your deposition?

A. I do so.

(Said check received in evidence, hereto appended marked "Exhibit No. 6".)

Q. 35. I show you check No. 13194 dated December 18, 1933, payable to the order of the Hamilton National Bank, in the sum — $9.04 and ask you to state for what that was given?

A. That was interest on $1,550.00 for thirty days, figured at seven per cent.

Q. 36. I will ask you to make that Exhibit Number Seven?

A. I do.

(Said check received in evidence, hereto appended marked "Exhibit No. 7".)

Q. 37. I show you check No. 13195, dated December 18, 1933, payable to the Hamilton National Bank in the sum of $238.58, and ask you to state what that was given for [fol. 35] and the rate of interest at which it was figured?

A. That was interest on $40,900.00 for thirty days, figured at seven per cent.

Q. 38. I ask you to make that Exhibit Number Eight to your deposition?

A. I do so.

(Said check received in evidence, hereto appended marked "Exhibit No. 8".)

Q. 39. I show you check No. 13220, dated January 3, 1934, payable to the order of the Hamilton National Bank, in the sum of $42.77 and ask you to state what that represents?

A. $12.00 of that was applied on a note, for Notes Payable, and $30.77 was interest.

Q. 40. Will you look at your journal, or ledger, and state the amount of the loan? I will ask you if that covered a

loan of $2,638.00 made at that time?

A. Whether it did or not?

Q. 41. Yes, in January, 1934.

A. Yes. January 3, 1934, we renewed a note for $2,638.00 for sixty days.

Q. 42. At what rate of interest?

A. Seven per cent.

Q. 43. I will ask you to make that Exhibit Number Nine to your deposition?

A. I do so.

(Said check received in evidence, hereto appended, marked "Exhibit No. 9".)

Q. 44. I show you check No. 13228, dated January 8, 1934, payable to the order of Hamilton National Bank, in the sum of $7.58, and ask you to look at your ledger and say whether or not that was given in payment of discount on a loan of $1,300.00 made on that date?

A. That was for interest on $1,300.00 for thirty days at seven per cent.

[fol. 36] Q. 45 I will ask you to make that Exhibit Number Ten to your deposition?

A. I do so.

(Said check received in evidence, hereto appended, marked "Exhibit No. 10".)

Q. 46. I hand you check No. 13245, dated January 10, 1933, payable to the order of the Hamilton National Bank in the sum of $239.58, stamped on back thereof January 12, 1934, and ask you — state what was the correct date of that check, and for what it was given?

A. My cash book records shows this check was issued on January 11, 1934, and was for interest, but my record does not show the amount of the loan.

Q. 47. I will ask you to look at your ledger or journal sheet, and state whether or not that was given to cover interest on $40,900.00 for a period of thirty days?

A. Yes, sir; $40,900.00.

Q. 48. For what period?

A. Thirty days.

Q. 49. At what rate of interest?

A. Seven per cent.

Q. 50 I ask you to make that Exhibit Number Eleven to your deposition?

A. I do so.

(Said check received in evidence, hereto appended marked "Exhibit No. 11".)

Q. 51. I show you check No. 13249, dated January 12, 1934, payable to the Hamilton National Bank, in the sum of $12.83, and ask you for what that was given?

A. That was interest on $2,200.00 for thirty days at seven per cent.

[fol. 37] Q. 52. I will ask you to make that Exhibit Number Twelve to your deposition?

A. I do so.

(Said check received in evidence, hereto appended marked "Exhibit No. 12".)

Q. 53. I show you check No. 13261 dated January 17, 1934, payable to the order of the Hamilton National Bank, in the sum of $9.04 and ask you for what that was given, and at what rate the interest was figured?

A. That was interest on $1,550.00 for thirty days at seven per cent.

Q. 54. I ask you to make that Exhibit Number Thirteen to your deposition?

A. I do so.

(Said check received in evidence, hereto appended marked "Exhibit No. 13".)

Q. 54. I show you check No. 13272, dated January 27, 1933 and marked on back of it, "Paid January 27, 1934," payable to the order of the Hamilton National Bank, in the sum of $536.84, and ask you to look at your records and state what connection that has with the renewal of a loan of $40,600.00 under date of January 26, 1934?

A. According to our cash book record, on January 26th, we issued a check to the Hamilton National Bank for $536.84; $300.00 of which was applying on the note and $236.84 was interest on $40,600.00 for thirty days at seven per cent.

Q. 55. I ask you to make that Exhibit Number Fourteen to your deposition?

A. I do so.

(Said check received in evidence, hereto appended, marked "Exhibit No. 14".)

Q. 56. Mr. Iler, can you now explain why it is that the note for $40,900.00 dated December 18, 1933, was renewed

for the same amount on January 11, 1934, for thirty days, [fol. 38] and on January 26th, fifteen days later, was reduced and renewed for $40,600.00?

A. The only explanation I can give of it is that we were short of funds and had to wait until we got them to pay the interest.

Q. 57. It would appear that you renewed the note before it was due, since the note which was executed on December 18, 1933, for thirty days, had not matured on January 11, 1934, when it was renewed again for thirty days?

A. We probably did not pay the interest the first time it was due.

Q. 58. But the check that you have shown here was paid, as shown by the check itself?

A. Yes, sir.

Q. 59. I show you check No. 13292 dated February 7, 1934, payable to the order of the Hamilton National Bank, in the sum of $7.58 and ask you what that was given for and at what rate of interest it was calculated?

A. That was interest on $1,300.00 for thirty days at seven per cent.

Q. 60. I will ask you to make that Exhibit Number Fifteen to your deposition?

A. I do so.

(Said check received in evidence, hereto appended marked "Exhibit No. 15".)

Q. 61. I show you check No. 13317 dated February 12, 1934, payable to the order of the Hamilton National Bank in the sum of $12.83, and ask you to state what that was for and at what rate of interest that was figured?

A. On the back of the check it says "Interest on $2,200.00 for thirty days," the rate of interest was seven per cent.

Q. 62. I will ask you to make that Exhibit Number Sixteen to your deposition?

[fol. 39] A. I do so.

(Said check received in evidence, hereto appended marked "Exhibit No. 16".)

Q. 63. I show you check No. 133324 dated February 16, 1934, payable to the order of the Hamilton National Bank, in the sum of $9.04, and ask you to state what that was given for and at what rate the interest was calculated?

A. On our check book record it shows it paid the interest on $1,550.00 for thirty days, rate of interest was seven per cent.

Q. 64. I will ask you to make that Exhibit Number Seventeen to your deposition?

A. I do so.

(Said check received in evidence, hereto appended marked "Exhibit No. 17".)

Q. 65. I show you check No. 1330, dated February 28, 1934, payable to the order of the Hamilton National Bank in the sum of $236.83, and ask you to state what that was given for and what rate of interest does it represent?

A. That was interest on note for $40,600.00 for thirty days at seven per cent.

Q. 66. I will ask you to make that Exhibit Number Eighteen to your deposition?

A. I do so.

(Said check received in evidence, hereto appended, marked "Exhibit No. 18".)

Q. 67. I show you check No. 13334, dated March 5, 1934 payable to the order of the Hamilton National Bank, in the sum of $43.46 and ask you to state what that represents, and the rate of interest included therein?

A. $13.00 of that applied on a note, and $30.46 was for interest on $2,625.00 for sixty days at seven per cent.

Q. 68. I will ask you to make that Exhibit Number Nine-
[fol. 40] teen to your deposition?

A. I do so.

(Said check received in evidence, hereto appended, marked "Exhibit No. 19".)

Q. 69. I show you check No. 13337, dated March 9, 1934, payable to the order of the Hamilton National Bank, in the sum of $36.17, and ask you to state what that represents, and what rate of interest is included therein?

A. $33.71 was to apply on a note, and $2.46 was interest.

Q. 70. I will ask you if that was interest for twelve days on $1,266.99?

A. Yes, sir.

Q. 71. At what rate?

A. Seven per cent.

Q. 72. I will ask you to make that Exhibit Number Twenty to your deposition?

A. I do so.

(Said check received in evidence, hereto appended marked "Exhibit No. 20".)

Q. 73. I show you check No. 13360 dated March 14, 1934, payable to the order of the Hamilton National Bank, in the sum $12.83, and ask you to state what that represents and the rate at which the interest was calculated?

A. That was interest on $2,200.00 for thirty days, figured at seven per cent.

Q. 74. I will ask you to make that Exhibit Number Twenty-one to your deposition?

A. I do so.

(Said check received in evidence, hereto appended, marked "Exhibit No. 21".)

Q. 75. I show you check No. 13368 dated March 19, 1934, payable to the order of the Hamilton National Bank, in the [fol. 41] sum $2.46 and ask you to state what that represents, and the rate at which the interest was calculated, and for what length of time?

A. From our cash book it shows it was interest on $1,266.29 for ten days at seven per cent.

Q. 76. I will ask you to make that Exhibit Number Twenty-Two to your deposition?

A. I do so.

(Said check received in evidence, hereto appended, marked "Exhibit No. 22".)

Q. 77. I show you check No. 13370 dated March 19, 1934, payable to the order of the Hamilton National Bank, in the sum of $5.03, and ask you to state what that represents, and the rate at which the interest was calculated?

A. There was $2.09 of this check was applied on a note, and the other was interest on $1,512.22 for ten days at seven per cent.

Q. 78. I ask you to make that Exhibit Number Twenty-three to your deposition?

A. I do so.

(Said check received in evidence, hereto appended, marked "Exhibit No. 23".)

Q. 89. I show you check No. 13385 dated March 27, 1934, payable to the order of the Hamilton National Bank, in the sum of $236.83 and ask you to state what that represents, and at what rate the interest was calculated?

A. That was interest on $40,600.00 for thirty days at seven per cent.

Q. 90. I will ask you to make that Exhibit Number Twenty-four to your deposition?

A. I do s-.

(Said check received in evidence, hereto appended, marked "Exhibit No. 24".)

Q. 91. I show you check No. 13404, payable to the Hamil-
[fol. 42] ton National Bank, dated April 7, 1934, in the sum of $71.46 and ask you what that represents, and the rate at which the interest was calculated?

A. $70.00 applied on a note, and $1.46 was interest on $500.00 for fifteen days at seven per cent.

Q. 92. I will ask you to make that Exhibit Number Twenty-five to your deposition?

A. I do so.

(Said check received in evidence, hereto appended, marked "Exhibit No. 25".)

Q. 93. I show you check No. 13430 dated April 12, 1934, payable to the order of the Hamilton National Bank, in the sum of $12.83, and ask you to state what that was given for and the rate at which it was figured?

A. That was interest on $2,200.00 for thirty days, figured at seven per cent.

Q. 94. I will ask you to make that Exhibit Number Twenty-Six to your deposition?

A. I do so.

(Said check received in evidence, hereto appended, marked "Exhibit No. 26".)

Q. 95. I show you check No. 13456, dated April 25, 1934, payable to the order of the Hamilton National Bank, in the sum of $236.83, and ask you to state what that represents and at what rate the interest was figured?

A. That was interest on $40,600.00 for thirty days at seven per cent.

Q. 96. I ask you to make that Exhibit Number Twenty-seven to your deposition?

A. I do so.

(Said check received in evidence, hereto appended, [fol. 43] marked "Exhibit No. 27".)

Q. 97. I show you check No. 13462, dated May 2, 1934, payable to the order of the Hamilton National Bank, in the sum of $52.46 and ask you to state what that represents, please, and what rate the respective interest items were calculated at?

A. $10.00 of this applied on a note. $1.00 was interest, I don't know the amount, the minimum interest; $30.46 was interest on $2,625.00 for sixty days at seven per cent; $10.00 applied on a note of C. E. Quintel, and interest was $1.00, which was the minimum rate.

Q. 98. I ask you to make that Exhibit Number Twenty-eight to your deposition?

A. I do so.

(Said check received in evidence, hereto appended, marked "Exhibit No. 28".)

Q. 99. I show you check No. 13498, dated May 11, 1934, payable to the defendant Hamilton National Bank, in the sum of $12.83; and will ask you to state what that was given for and the rate at which the interest was figured?

A. That was interest on $2,200.00 for thirty days, figured at seven per cent.

Q. 100. I will ask you to make that Exhibit Number Twenty-nine to your deposition?

A. I do so.

(Said check received in evidence, hereto appended, marked "Exhibit No. 29".)

Q. 101. I show you check No. 13527, dated May 28, 1934, payable to the Hamilton National Bank, in the sum of $236.83, and ask you for what that was given and the rate at which the interest was calculated?

A. From my records it shows it was interest on $40,600.00 for thirty days at seven per cent.

[fol. 44] Q. 102. I will ask you to make that Exhibit Number Thirty to your deposition?

A. I do so.

(Said check received in evidence, hereto appended marked "Exhibit No. 30".)

Q. 103. I show you check No. 13580 dated June 11, 1934, payable to the order of the Hamilton National Bank, in the sum of $12.83 and ask you for what that was given and the rate?

A. That was interest on $2,200.00 for sixty days at seven per cent.

Q. 104. I ask you to make that Exhibit Number Thirty-one?

A. I do.

(Said check received in evidence, hereto appended, marked "Exhibit No. 31".)

Q. 105. Mr. Iler, I will ask you to look at your records and see what was done with respect to a loan of $40,500.00 on June 23, 1934, especially with respect to the renewal thereof for sixty days?

A. From my journal record it shows that we gave the Hamilton National Bank on that date a note signed by C. E. Groves for $562.65; $472.50 was interest on $40,500.00 for sixty days; $16.37 was the interest on the Groves note and $73.78 applied on a note.

Q. 106. At what rate of interest was that $472.50 calculated?

A. Seven per cent.

Q. 107. Was that Groves note endorsed by the Lookout Planing Mills?

A. Yes, sir.

Q. 108. Was that note finally paid?

A. Yes, sir; to the best of my knowledge and belief.

Q. 109. At least the Lookout Planing Mills never heard anymore from that, is that right?

A. No, sir; Mr. Groves showed me the cancelled note the [fol. 45] other day, the last payment of it.

Q. 110. I show you check No. 13610 dated June 30, 1934, payable to the order of the Hamilton National Bank, in the sum of $30.46 and ask you to state for what that was given?

A. That was for interest on $2,625.00 for sixty days at seven per cent.

Q. 111. I ask you to make that Exhibit Number Thirty-two to your deposition?

A. I do so.

(Said check received in evidence, hereto appended, marked "Exhibit No. 32".)

Q. 112. I show you check No. 13655 dated July 11, 1934, payable to the order of the Hamilton National Bank in the sum of $12.83, and ask you to state what that represents?

A. That was interest on $2,200.00 for thirty days at seven per cent.

Q. 113. I ask you to make that Exhibit Number Thirty-three to your deposition?

A. I do so.

(Said check received in evidence, hereto appended, marked "Exhibit No. 33".)

Q. 114. I show you check No. 13718 dated August 11, 1934, payable to the order of the Hamilton National Bank, in the sum of $12.83, and ask you to state for what that was given?

A. That was interest on $2,200.00 for thirty days at seven per cent.

Q. 115. I will ask you to make that Exhibit Number Thirty-four to your deposition?

A. I do so.

(Said check received in evidence, hereto appended, marked "Exhibit No. 34".)

[fol. 46] Q. 116. I show you check No. 13734, dated August 22, 1934, payable to the order of the Hamilton National Bank, in the sum of $100.00, and ask you to state for what that was given; and I also at the same time show you check No. 13735 payable to the order of the Hamilton National Bank in the sum of $68.00, dated August 23, 1934; and check No. 13736 dated August 23, 1934, payable to the order of the Hamilton National Bank in the sum of $68.25, ans ask what those three checks were given for?

A. Those three checks were given for interest on $40,600.00 for thirty days figured at seven per cent.

Q. 117. I will ask you to make those checks Exhibit Numbers Thirty-five, thirty-six and thirty-seven, respectively, to your deposition?

A. I do so.

(Said checks received in evidence, hereto appended, marked respectively, "Exhibits Nos. 35, 36, and 37".)

Q. 118. Now, were those checks paid on the date they were issued?

A. No, sir, they were given on the 23rd of August, and the bank very kindly held these checks until we had money sufficient to pay them.

Q. 119. Look at the backs of those checks and state when they were paid, Mr. Iler?

A. Check for $100.00 was paid on August 24th, the one for $68.00 was paid on August 27th, and the one for $68.25 was paid on September 11th.

Q. 120. I show you check No. 13744 dated August 29, 1934, payable to the order of the Hamilton National Bank in the sum of $30.46 and ask you to state what that was given for?

A. That was interest on $2,625.00 for thirty days at seven per cent.

Q. 121. I will ask you to make that Exhibit Number Thirty-eight to your deposition?

[fol. 47] *to your deposition?*

A. I do so.

(Said check received in evidence, hereto appended, marked "Exhibit No. 38".)

Q. 122. I show you check No. 13759 dated September 8, 1934, payable to the order of the Hamilton National Bank, in the sum of $12.83, and ask you to state what that was given for and the rate?

A. That was interest on $2,200.00 for thirty days at seven per cent.

Q. 123. I will ask you to file that check as Exhibit Number Thirty-nine to your deposition?

A. I do so.

(Said check received in evidence, hereto appended, marked "Exhibit No. 39".)

Q. 124. I show you check No. 13800, and check No. 13801, both dated September 22, 1934; the first being in the sum of $136.25, and the second being in the sum of $100.00, and the date being changed in pencil from September 22nd, to September 29, 1934; and ask what those checks were given for and the rate at which the interest was calculated?

A. Those checks were given in payment of interest on $40,600.00 for thirty days at seven per cent.

Q. 125. And when were those checks paid, Mr. Iler?

A. The $136.25 check was paid September 24th, and the check for $100.00 was paid on October 1st.

Q. 126. I will ask you to make those checks Exhibits Numbers Forty and Forty-One, respectively, to your deposition?

A. I do so.

(Said checks received in evidence, hereto appended, marked respectively, "Exhibits Nos. 40 and 41".)

Q. 127. I show you check No. 13819 dated October 8, 1934, payable to the order of the Hamilton National Bank in the [fol. 48] sum of $38.83, and ask you what items that check covers, and the rate at which the interest was calculated?

A. $25.00 was to apply on note; $1.00 was interest, on the note it covered my records do not show; and $12.83 was interest on $2,200.00 for thirty days at seven per cent.

Q. 128. I will ask you to make that Exhibit Number Forty-two to your deposition?

A. I do so.

(Said check received in evidence, hereto appended, marked "Exhibit No. 42".)

Q. 129. I show you checks Nos. 13864 and 13865, both dated October 22, 1934, payable to the order of the Hamilton National Bank; the first being in the sum of $136.25, and the second being in the sum of $100.00; above the date as written by yourself, the date October 31st, is inserted in pencil, and ask you to state what those two checks cover and when they were paid?

A. These two checks were given to cover interest on $40,500.00 for thirty days at seven per cent. The $136.25 check was paid on October 23rd, and the $100.00 check was paid on November 1st.

Q. 130. I ask you to make those checks Exhibits Forty-Three and Forty-Four respectively to your deposition?

A. I do so.

(Said checks received in evidence hereto appended marked respectively, "Exhibits Nos. 43 and 44".)

Q. 131. I show you check No. 13873, dated October 29, 1934, payable to the order of the Hamilton National Bank, in the sum of $30.46; and ask you to state what that was given for and the rate at which the interest was calculated?

A. That was interest on $2,625.00 for sixty days at seven per cent.

Q. 132. I will ask you to make that Exhibit Number Forty-Five to your deposition?

[fol. 49] A. I do so.

(Said check received in evidence, hereto appended, marked "Exhibit No. 45.")

Q. 133. I show you check No. 13878, dated November 7, 1934, payable to the order of the Hamilton National Bank in the sum of $12.83, and ask you to state what that was given for, and the rate at which the interest was calculated?

A. That was interest on $2,200.00 for thirty days at seven per cent.

Q. 134. I will ask you to make that Exhibit Number Forty-six to your deposition?

A. I do so.

(Said check received in evidence, hereto appended, marked "Exhibit No. 46".)

Q. 135. I show you checks Nos. 13924 and 13925, and 13926, dated November 20, 1934; the first being in the sum of $136.25, and the second and third both being in the sum of $50.00, each. I ask you to state what they were given for, the rate at which the interest was calculated, and when those checks were paid?

A. Those three checks total $236.25 and were given to pay interest on $40,500.00 for thirty days, at seven per cent. The $136.25 was paid on November 21st; check No. 13925 was paid on November 26th, and check No. 13926 was paid December 1st.

Q. 136. I will ask you to make those checks Exhibits Numbers Forty-seven, Forty-eight and Forty-nine respectively?

A. I do so.

(Said checks received in evidence, hereto appended, marked respectively, "Exhibits Nos. 47, 48 and 49.")

Q. 137. At what rate was the interest calculated?

A. Seven per cent.

Q. 138. I show you check No. 13944 dated December 7, [fol. 50] 1934, payable to the order of the Hamilton National Bank in the sum of $28.16, and ask you to state what items that covers and the rate at which the interest was calculated?

A. $12.83 paid the interest on $2,200.00 for thirty days at seven per cent, and $15.33 paid the interest on J. C. Miller's note for $2,300.00 for thirty days, figured at eight per cent.

Q. 139. I will ask you to make that Exhibit Number Fifty to your deposition?

A. I do so.

(Said check received in evidence, hereto appended, marked "Exhibit No. 50".)

Q. 140. I show you check No. 13992, dated December 21, 1934, payable to the order of the Hamilton National Bank, in the sum of $86.63 and ask you to state what that covered and the rate at which the interest was calculated?

A. That was paying interest on $40,500.00 for eleven days at seven per cent.

Q. 141. I will ask you to make that Exhibit Number Fifty-one to your deposition?

A. I do so.

(Said check received in evidence, hereto appended marked "Exhibit No. 51".)

Q. 142. I show you check No. 13997, dated December 31, 1934, payable to the order of the Hamilton National Bank, in the sum of $55.33, and ask you to state what that covers?

A. $25.00 of that was to apply on a note, and $30.33 was the interest on $2,600.00 for sixty days at seven per cent.

Q. 143. I will ask you to make that Exhibit Number Fifty-Two to your deposition?

A. I do so.

(Said check received in evidence, hereto appended, [fol. 51] marked "Exhibit No. 52".)

Q. 144. I show you checks Nos. 13998, 13999 and 14000, dated January 2, 1935, each being in the sum of $78.75, payable to the order of the Hamilton National Bank, and ask you to state what they were given for and the rate at which the interest was figured; also the dates on which those checks were paid?

A. The three checks total $236.25, in payment of the interest on $40,500.00 for thirty days at seven per cent. Check No. 14000 was paid on January 3rd, check No. 1399 was paid on January 11th, and check No. 13998 was paid on January 1st.

Q. 145. I will ask you to make those checks Exhibits Numbers Fifty-three fifty-four and fifty-five, respectively to your deposition?

A. I do so.

(Said checks received in evidence, hereto appended, marked respectively, Exhibits Nos. 53, 54 and 55".)

Q. 146. I show you check No. 14002 dated January 4, 1935, payable to the order of the Hamilton National Bank, in the

sum of $12.83, and ask you to state what that was given to cover, and the rate?

A. That was the interest on $2,200.00 for thirty days at seven per cent.

Q. 147. I will ask you to make that Exhibit Number Fifty-six to your deposition?

A. I do so.

(Said check received in evidence, hereto appended, marked "Exhibit No. 56".)

Q. 148. I show you check No. 14063 dated February 5, 1935, payable to the order of the Hamilton National Bank, in the sum of $12.83, and ask you to state what that was given to cover, and the rate?

A. That was interest on $2,200.00 for thirty days at seven per cent.

Q. 149. I ask you to make that Exhibit Number Fifty-[fol. 52] seven to your deposition?

A. I do so.

(Said check received in evidence, hereto appended, marked "Exhibit No. 57".)

Q. 150. I ask you to look to your record with respect to the renewal of a note for $40,500.00 on February 5, 1935; and also the item of $238.21 appearing immediately thereafter in the original bill, and state how that item was handled and how it was finally paid; in connection with which question I hand you checks Nos. 14119, dated February 28, 1935, payable to the order of the Hamilton National Bank in the sum of $41.61, and check 14131 dated March 8, 1935 payable to the Hamilton National Bank in the sum of $26.00, check No. 14165, dated March 21, 1935, payable to the order of the Hamilton National Bank in the sum of $16.00, and check No. 14214, dated April 11, 1935, payable to the order of the Hamilton National Bank in the sum of $156.60; and ask you to state how that transaction was handled and what connection, if any, those checks have with that transaction?

A. According to my journal record, on February 5, 1935, we gave the Hamilton National Bank a note for $238.21, $236.25 of which was interest on $40,500.00 for a period of thirty days, and the balance was interest on the note for $238.21.

Q. 151. For what period was that?

A. For thirty days.

Q. 152. At what rate of interest?

A. At seven per cent.

Q. 152. Now, how was that thirty day note of $238.21 retired?

A. The note for $238.21 was secured by certain accounts that we pledged to the bank. On February 28th, $41.61 of this was paid; on March 8th a check for $26.00, $25.00 applied on that note; and $1.00 for interest, renewing that [fol. 53] note, the unpaid balance of that note. On March 21st, $15.00 was paid on the note and $1.00 interest on the unexpired part of the note. Then on April 11th, $156.60 was paid, paying that note in full.

Q. 154. I will ask you to make those checks Exhibits Numbers Fifty-eight, Fifty-nine, Sixty and Sixty-one respectively to your deposition?

A. I do so.

(Said checks received in evidence, heteto appended marked respectively "Exhibits Nos. 58, 59, 60 & 61".)

Q. 155. You have stated in your last answer, that two of these checks included $1.00 each in the way of interest. Was that calculated at any particular rate, or was that merely the minimum charge?

A. That was the minimum rate.

Q. 156. Was that more or less than seven per cent, or could you tell by looking at the checks?

A. No, I could not tell by looking at the checks, without going back and checking the shole thing.

Q. 157. That is a matter of calculation, is it?

A. It is just the minimum rate of interest with the bank.

Q. 158. I show you check No. 14117, dated February 26, 1935, payable to the order of the Hamilton National Bank, in the sum of $40.33, and ask you to state what that represents?

A. That was interest on $2,600.00 for sixty says, at seven per cent.

Q. 159. I will ask you to make that Exhibit Number Sixty-two to your deposition?

A. I do so.

(Said check received in evidence, hereto appended, marked "Exhibit No. 62".)

Q. 160. I show you check No. 14121, dated March 1, 1935, payable to the order of the Hamilton National Bank, in

the sum of $236.25, and ask you to state what that represents and the rate?

[fol. 54] A. Interest on $40,500.00 for thirty days at seven per cent.

Q. 161. I will ask you to make that Exhibit Number Sixty-three to your deposition?

A. I do so.

(Said check received in evidence, hereto appended, marked "Exhibit No. 63".)

Q. 162. I show you check No. 14130, dated March 7, 1935, payable to the order of the Hamilton National Bank in the sum of $28.16, and ask you to state what items that represents, and if it represents any item of interest please state the rate at which it was calculated?

A. $12.83, was for interest on $2,200.00 for thirty days at seven per cent; and $15.33 was interest on the note of J. C. Miller, for $2,300.00, for thirty days, figured at eight per cent.

Q. 163. I will ask you to make that Exhibit Number Sixty-four to your deposition?

A. I do so.

(Said check received in evidence, hereto appended, marked "Exhibit No. 64.")

Q. 164. I show you check No. 14176, dated April 3, 1935, payable to the order of the Hamilton National Bank, in the sum of $236.25, and ask you to state what that represents?

A. That was interest on $40,500.00 for thirty days at seven per cent.

Q. 165. I will ask you to make that Exhibit Number Sixty-five to your deposition?

A. I do so.

(Said check received in evidence, hereto appended, marked "Exhibit No. 65".)

Q. 166. I show you check No. 141.80, dated April 6, 1935, payable to the order of the Hamilton National Bank in the sum of $28.16 and ask you to state what that represents, [fol. 55] and if it represents interest, state at what rate the items were figured?

A. $15.33 was interest on the J. C. Miller note for $2,300.00, for thirty days at eight per cent; $12.83 was interest on $2,200.00 for thirty days at seven per cent.

Q. 167. I will ask you to make that check Exhibit Number Sixty-six to your deposition?

A. I do so.

(Said check received in evidence, hereto appended, marked "Exhibit No. 66".)

Q. 168. I show you check No. 14215, dated April 10, 1935, payable to the order of the Hamilton National Bank, in the sum of $2.75 and ask you to state what that represents, and the rate at which the interest was calculated?

A. That was interest on a note for $472.50 for thirty days at seven per cent.

Q. 169. I will ask you to make that Exhibit Number Sixty-seven to your deposition?

A. I do so.

(Said check received in evidence, hereto appended, marked "Exhibit No. 67".)

Q. 170. I show you check No. 14230, dated April 26, 1935, payable to the order of the Hamilton National Bank, in the sum of $15.17, and ask you to state what that represents?

A. According to my records, that is the interest on $2,600.00 for thirty days at seven per cent.

Q. 171. I ask you to make that check Exhibit Number Sixty-eight to your deposition?

A. I do so.

(Said check received in evidence, hereto appended, marked "Exhibit No. 68".)

Q. 172. I show you check No. 14248 dated May 6, 1936, [fol. 56] payable to the order of the Hamilton National Bank, in the sum of $28.16, and ask you the same question?

A. $12.83 was interest on $2,200.00 for thirty days, at seven per cent; $15.33 was interest on $2,300.00, the note of J. C. Miller, $2,300.00, for thirty days, at eight per-cent.

Q. 173. I will ask you to make that Exhibit Number Sixty-nine to your deposition?

A. I do so.

(Said check received in evidence, hereto appended, marked "Exhibit No. 69".)

A. 174. I show you check No. 14289 dated May 27, 1935, payable to the order of the Hamilton National Bank, in the sum of $15.17, and ask you to state what that represents?

A. That was interest on $2,600.00 for thirty days, at seven per cent.

Q. 175. I will ask you to make that Exhibit Number Seventy to your deposition?

A. I do so.

(Said check received in evidence, hereto appended, marked "Exhibit No. 70.")

Q. 176. I show you check No. 14277, dated May 11, 1935, payable to the order of the Hamilton National Bank, in the sum of $55.01 and ask you to state what item or items that represents, and the rate?

A. $53.00 of this check applied on a note, and $2.01 was interest on $344.50 for thirty days at seven per cent.

Q. 177. I ask you to make that check Exhibit Number Seventy-one to your deposition?

A. I do so.

(Said check received in evidence, hereto appended, marked "Exhibit No. 71".)

Q. 178. I show you check No. 14301, dated June 5, 1935, payable to the Hamilton National Bank, in the sum of $28.16, and ask you to state what item or items that repre- [fol. 57] sents, and the rate or rates at which the interest was calculated?

A. $12.83 was interest on $2,200.00 for thirty days at seven per cent; and $15.33 was interest on note of J. C. Miller for $2,300.00, thirty days at eight per cent.

Q. 179. I will ask you to make that Exhibit Number Seventy-two to your deposition?

A. I do so.

(Said check received in evidence, hereto appended, marked "Exhibit No. 72".)

Q. 180. I show you check No. 14338 dated June 25, 1935, payable to the order of Hamilton National Bank, in the sum of $15.17 and ask you to state what item that represents?

A. That was interest on $2,600.00 for thirty days at seven per cent.

Q. 181. I will ask you to make that Exhibit Number Seventy-three to your deposition?

A. I do so.

(Said check received in evidence, hereto appended, marked "Exhibit No. 73".)

Q. 182. I show you check No. 14353 dated July 6, 1935, in the sum of $28.16 and ask you to state what items that represents?

A. $12.83 was interest on $2,200.00 for thirty days at seven per cent; and $15.33 was interest on note of J. C. Miller for $2,300.00 for thirty days at eight per cent.

Q. 183. I will ask you to make that Exhibit Number Seventy-four to your deposition?

A. I do so.

(Said check received in evidence, hereto appended, marked "Exhibit No. 74".)

Q. 184. I show you checks Nos. 13029, dated September 12, 1933, check 13184, dated December 13, 1933; check No. 13257, [fol. 58]dated January 13, 1934; check No. 13319 dated February 14, 1934; check No. 13361 dated March 14, 1934; check No. 13432 dated April 13, 1934; check No. 13505 dated May 12, 1934; check No. 13582 dated June 11, 1934; check No. 13663 dated July 17, 1934; check No. 13719 dated Aug. 11, 1934; check No. 13860 dated September 8, 1934; check No. 13882 dated October 9, 1934; Check No. 13881 dated November 7, 1934; Check No 14006 dated January 5, 1935 and check No. 14064 dated February 5, 1935, all being payable to the order of the Hamilton National Bank, and all being in the sum of $15.33, I will ask you to state what connection, if any, they have with respect to the rediscount of a note of J. C. Miller in the sum of $2,300.00?

A. These checks were given to cover the interest on a note of J. C. Miller, each one for a thirty-day period, the amount of the note being $2,300.00, the interest figured at eight per cent.

Q. 185. I will ask you to let all these checks be fastened together with a solid clip and that all of these checks, the numbers of which have been given, be made Exhibit Seventy-five to your deposition?

A. I do so.

(Said checks received in evidence, hereto appended marked "Exhibit No. 75".)

Q. 186. Now, Mr. Iler, I will ask you whether or not in addition to those checks other items of interest were in-

cluded in other checks which you have heretofore filed today, as you have set forth in your answers to questions given you?

A. Yes, sir.

Q. 187. I show you checks Nos. 13095 dated October 17, 1933, check No. 13183 dated December 13, 1933, check No. 13318, dated February 12, 1934; check No. 13431 dated April 12, 1934; check No. 13581 dated June 11, 1934; check No. 13714 dated August 9, 1934; check No. 13940 dated December 3, 1934; check No. 14067 dated February 8, 1935; check No. 14177, dated April 3, 1935; and check No 14298 [fol. 59] dated June 3, 1935, all payable to the other of the Hamilton National Bank, and all being in the sum of $5.53 and ask you to state what connection, if any, they have with the re-discount of a note of Sara E. Goodner, in the sum of $450.00.

A. These checks were all given in payment of interest on a note signed by Sarah E. Goodner for $450.00, each check paying sixty days interest at eight per cent.

Q. 188. I will ask you to make those checks Exhibit Number Seventy-six to your deposition, fastened together with a permanent fastener?

A. I do so.

(Said checks received in evidence, hereto appended, marked "Exhibit No. 76".)

Q. 189. Now, Mr. Iler, I will ask you to look at check No. 13822 dated October 9, 1934, payable to the order of the Hamilton National Bank and which now forms a part of Exhibit Seventy-five to your deposition, and state if a part of that check did nor did not go to interest on the Sarah E. Goodner note, about which you have been asked?

A. Yes, sir; $15.33 of this check paid the interest on the note of J. C. Miller, and $5.53 paid the interest on the Sarah E. Goodner note for sixty days, figured at eight per cent.

Q. 190. Now, Mr. Iler, during the course of your examination, you have referred to some ledger sheets. Are they the original records of the Lookout Planing Mills?

A. Yes, sir.

Q. 191. Would you have objection to filing those records and letting them be made a part of the record in this cause, subject to withdrawal upon the termination of this litiga-

tion; that is to say, those records from which you have testified only?

A. These records are subject to the orders of the Federal Court, of the Bankrupt Court. Whatever his instructions are, I will abide by.

Q. 192. In event Referee should direct that the sheets [fol. 60] pertaining to this matter should be filed, are you willing that they be made an Exhibit to your deposition?

A. Yes, sir.

Q. 193. How many sheets would there be, probably, Mr. Iler, covers the items you have testified about?

A. I am unable to tell, Mr. Thompson, because it would take the records for a period of two years.

Q. 194. Mr. Iler, subject to the approval of the Referee in Bankruptcy I will ask you to make all pages from your Journal from which you have testified here today, Exhibit Number Seventy-seven to your deposition; and I will ask you to make all ledger sheets from which you have testified here today, Exhibit Number Seventy-eight to your deposition?

A. I will do so.

(Said Ledger sheets received in evidence, filed separately herewith as "Exhibit- Nos. 77 and 78", respectively.)

Q. 195. Mr. Iler, I show you a check No. 13271 dated January 27, 1934 payable to the order of the Hamilton National Bank in the sum of $54.00, and ask you what that was given for?

A. That was given for the semi-annual interest on a loan of $1,800.00 on what we called the Woodland Park Loan.

Q. 196. Was any amount in addition to that $54.00 paid on account of that loan about that time?

A. We paid a one per cent commission at the time the loan was made.

Q. 197. So that you actually paid seven per cent on the loan, did you?

A. Yes, sir.

Q. 198. I will ask you to file that check No. 13271 which has been described, as Exhibit Number Seventy-nine to your deposition?

A. I do so.

[fol. 61] (Said check received in evidence, hereto appended, marked "Exhibit No. 79".)

Q. 199. Mr. Iler, can you state when the commission or excess of one per cent was paid on that loan; can you look at your ledger or journal there and state when the transaction was had?

A. One per cent commission on that loan was paid on October 6, 1933.

Q. 200. I show you check No. 13042 dated September 22, 1933, payable to the order of the Hamilton National Bank, in the sum of $54.00, and ask you what connection that has with that Woodland Park note, and if that was when the note was originally negotiated?

A. That was the semi-annual interest on the Woodland Park property.

Q. 201. I will ask you to make that check Exhibit Number Eighty to your deposition?

A. I do so.

(Said check received in evidence hereto appended, marked "Exhibit No. 80".)

Q. 202. At what rate was that figured?

A. Six or three per cent, semi-annually.

Q. 203. I show you check No. 13059 dated October 6, 1933, payable to the order of the Hamilton National Bank, in the sum of $18.00 and ask you to state if that is a check which was given for the discount, or the premium, or the commission, which was paid as you say in addition to the six per cent on the loan?

A. Yes, sir.

Mr. Meacham: We object because leading.

Objection overruled. Appeal prayed and granted.

Mr. Thompson:

Q. 204. Well, what was that given for?

A. For one per cent commission on the real estate loan [fol. 62] on the Woodland Park property.

Q. 205. I ask you to make that check Exhibit Number Eighty-one to your deposition?

A. Yes, sir.

Q. 206. Mr. Iler, when you would discount or renew a note, would you calculate the interest and make out the check

for the discount or interest before you went to the bank?

A. Yes, sir.

Q. 207. And then what would you do with that note and check for interest when you *to* to the Hamilton National Bank?

A. Take it to the discount window.

Q. 208. What would the discount teller do with respect to making some calculations with respect to the interest?

A. Why, he would check it to see if my figures were correct.

Q. 209. Did he accept these checks that you have exhibited here for the discount or interest *at* they were tendered?

A. Yes, sir.

Q. 210. Mr. Iler, you have been asked to file the original ledger and journal sheets to which you have referred today. I will ask you if you have referred to other original records in giving answers to questions?

A. Yes, sir; I referred to my cash record, my cash register.

Q. 211. Now, what instructions, if any, did you have from the Trustee in Bankruptcy with respect to the delivery of these records?

A. I was instructed by the Trustee to turn over to you all records that you might call for.

Q. 212. Now, under instructions of solicitors for the Trustee, or under their request that you file as exhibits to your deposition the original ledger and journal sheets marking them exhibits as heretofore requested, and that you also file as Exhibit Number eighty-two to your deposition the [fol. 63] original cash register sheets to which you have referred. Will you do that, Mr. Iler, at the request for solicitors for the trustee?

A. According to Mr. McCollum's instructions, I will.

(Said original cash register sheets received in evidence filed separately herewith, marked "Exhibit No. 82".)

Mr. Thompson: That is all.

Cross-examination.

Questions by C. W. K. Meacham, Esq.:

X 1. Mr. Iler, who was the bookkeeper of your company?

A. I was during this last two year period.

X 2. Did you keep all those records yourself?

A. Yes, sir.

X 3. No one else helped you?

A. No, sir.

X 4. Who signed the Woodland Park note?

A. Mr. Meacham, I could not say. That note was in existence when I went to the Lookout Planing Mills.

X 5. Was it signed by the Lookout Planing Mills and was it the Planing Mills' note?

A. No, it was signed by the Lookout Planing Mills, I always understood.

X 6. You say it was signed by the Lookout Planing Mills?

A. That is my understanding of it, yes.

X 7. Who was it payable to?

A. To the Hamilton National Bank. I presume it was. I never saw the note.

X 8. So you are just testifying with reference to that from hearsay?

A. Testifying from the records on the interest paid.

X 9. You do not know then to whom it was paid, who paid it or anything about it?

A. I know it was paid to the Hamilton National Bank be- [fol. 64] cause I took it down there.

X 10. By whom was it paid?

A. Paid by the Lookout Planing Mills.

X 11. Was anybody else obligated on that note to the Lookout Planing Mills, or a note upon which it was based?

A. I don't know sir.

X 12. Did anybody else pay you the amount of interest?

A. No, sir.

X 13. Was it charged against anybody else on your books?

A. No, sir.

X 14. Do you know as a matter of fact, of your own knowledge that that bank was the owner of that note and received that interest?

A. No, sir; I do not.

X 15. Now, Mr. Iler, who was the $2,300.00 note, designated the J. C. Miller note, signed by?

A. J. C. Miller.

X 16. And who was it made payable to?

A. To the Lookout Planing Mills.

X 17. And the Lookout Planing Mills was the owner of the note?

A. Yes, sir; we discounted it at the Hamilton National Bank.

X 18. Upon what date?

A. I could not tell you the original date, because it was in existence when I went there.

X 19. Was it ever paid by Miller?

A. Not to my knowledge.

X 20. Who paid the interest on it?

A. We did, the Lookout Planing Mills.

X 21. Did J. C. Miller pay you?

A. No, sir; he did not.

X 22. Did you charge it up against him on the books of your company?

A. Yes, sir.

[fol. 65] X 23. Did he agree to pay you that interest?

A. No, sir; he did not.

X 24. You charged it up against him?

A. We thought some day he would be able to take up that note and pay us the interest.

X 25. You did not charge that interest to the expense of operation of the Lookout Planing Mills?

A. No, sir; we did not.

X 26. You charged it as an account against Miller?

A. Yes, sir.

X 27. And that was the same situation with reference to the Goodner note, wasn't it?

A. Yes, sir.

X 28. Mr. Iler, who else was the Lookout Planing Mills paying interest on on notes, besides the Hamilton National Bank?

A. We paid some interest to the American Trust and some interest to the First National, on real estate loans.

X 29. What rate of interest did you pay them?

A. We paid them six per cent interest and one per cent commission.

X 30. At both banks?

A. Yes, sir.

X 31. Now, in reference to these various notes, especially that Forty Thousand odd dollar note that has been running for a good long while, hasn't it?

A. Yes, sir.

X 32. And it had been default in taxes on the property securing it, for a good many months, had not it?

A. Yes, sir.

X 33. And notwithstanding that, the Hamilton National Bank carried it along from month to month?

A. Yes, sir.

[fol. 66] X 34. And you do not know of your own knowledge whether that was charged as interest or whether it was compensation for carrying it, as a fee for carrying a past due note, do you?

A. No, sir; I do not.

X 35. Now, Mr. Iler, when did this company go into bankruptcy?

A. On July 17, 1935.

X 36. How much of that big note was unpaid, as shown by your records, at that time?

A. The full amount was unpaid.

X 37. Do you know how much still remains due and unpaid on that note?

A. No, sir; I don't know now.

X 38. Would your books show?

A. My books would show up to that period.

X 39. Would you please file a certified copy of that note as Exhibit "A" to your cross examination?

A. That big note?

X 40. Yes?

A. Yes, if the Bank will let me have a copy of it, I will.

Mr. Thompson: Solicitor for complainant objects to any copy of the note being filed.

Objection overruled. Appeal prayed and granted.

(Original of said note was received in evidence, hereto appended, marked "Exhibit A".)

X 41. Now, then, on the $2,265.00 note, when was that original transaction had?

A. The first time my ledger shows the $2,650.00 note was handled, was September 12, 1933.

X 42. How much remained unpaid on that note at the date of bankruptcy?

A. $2,296.81.

X 43. Has any part of that been paid since to your knowledge?

[fol. 67] A. Not to my knowledge, nor, sir. That note was secured by a Curtis inventory, or material on hand known as the Curtis Inventory. Since that time some of tha- ma-

terial has been sold and the money turned over to C. H. McCollum as Trustee.

X 44. But, you do not know what application has been made of it?

A. No, sir; I do not.

X 45. Will you please file that note if furnished by the bank as Exhibit "B" to your deposition?

A. I will do so.

(Said note received in evidence, hereto appended, marked "Exhibit B".)

X 46. State whether or not the $2,200.00 note listed has been fully paid?

A. Not to my knowledge.

X 47. What now remains as the balance on that note?

A. $2,200.00.

X 48. Will you file the original of that note, if furnished by the bank, as Exhibit "C" to your deposition?

A. I will do so.

(Said note received in evidence, hereto appended marked "Exhibit C".)

X 49. I notice here a $1,550.00 note dated December 18, 1933, has that been paid?

A. Was that a real estate note?

X 50. I cannot answer that, It is one you are charging interest was collected on.

A. What we were testifying on there was an $1,800.00 note, the Woodland Park property note was the note I was testifying on, $1,800.00.

X 51. You were testifying on that note when?

A. A few minutes ago.

X 52. I am asking though now about the $1,550.00 note [fol. 68] December 18, 1933. You have failed a check dated December 18, 1933, for $9.04, and stated that that was interest, and that is the note I have reference to?

A. Yes, sir. I am running it down right now. That note does not appear on my record after February 16, 1934.

X 53. Well, does your record show it was paid at that time?

A. It probably shows it was absorbed, Mr. Meacham. I will have to work that out.

X 54. I will ask you whether or not note dated January 8, 1934, for $1,300.00 is still owing and unpaid?

A. No, sir; that note was cleared out of the record.

X 35. Has it been paid then, or absorbed?

A. Yes, sir.

X 36. I will ask you to state, Mr. Iler, how much from your records was owing as a whole to the Hamilton National Bank at the date of bankruptcy?

A. On my Notes Payable, $45,122.88.

X 37. Did that include the Miller and the Goodner notes?

A. No, sir; it did not.

X 38. How much in addition was owing as the balance, if any, on those notes?

A. Both of those to the best of my knowledge were owing for the full amount.

X 39. Now, by whom were they executed?

A. One was executed by J. C. Miller, the other was executed by Sarah E. and Sam Goodner.

X 40. And the Lookout Planing Mills were merely endorser on them?

A. That is it, yes. We had sold them to the bank.

X 41. So in addition to the $45,122 dollars and some odd cents, you owed the $2,300.00 Miller note and the $415.00 Sarah Goodner note?

A. Yes, sir.

[fol. 69] X 42. Now, did you also owe the P. E. Groves note, as endorser?

A. Yes, sir.

X 43. How much was that?

A. I do not know how much that was at the time.

X 44. That was $124.00, was it, or not?

A. I do not know the exact amount of that note. That note has since been paid.

X 45. It has been paid?

A. Yes, sir.

X 46. Paid by whom?

A. By Mr. Groves.

X 47. Are you sure of that?

A. He showed me the last note the other day for $50.00 that he paid sometime this month.

X 48. To whom did he pay it?

A. The Hamilton National Bank.

X 49. State whether or not the Planing Mills, as endorser, was also liable on a note of C. O. Stevens, for an unpaid balance of $394.00?

A. Yes, sir.

X 50. And that has not been paid?

A. Not to my knowledge. I don't know.

X 51. You did not include that in your total just now?

A. No, sir.

X 52. You did not include some of the other notes I have mentioned?

A. No real estate notes, no, sir.

X 53. You did not include the $40,000.00 note in that?

A. Yes, sir.

X 54. Did you include the Goodner and Miller notes, I believe you stated you had not?

A. I had not, no, sir.

[fol. 70] X 55. Now, Mr. Iler, will you file as Exhibits, the original notes that were outstanding at the date of bankruptcy, if the Hamilton National Bank will furnish them to you for that purpose?

A. Yes, sir.

(The notes of J. C. Miller, $2,300.00; Sarah E. Goodner, $415.00; C. O. Stevens, $394.00 and Lookout Planing Mills note of $126.00, dated June 29, 1935, received by the reporter from the bank, hereto appended, marked respectively, "Exhibits "D", "E", "F", and "G".)

Memorandum from Bank, stating "Groves note for $150.00 has been paid out and hasn't it. All here except that one.")

X 56. Did you consent to the filing of this suit for the recovery of interest?

A. No, sir; I knew nothing about it.

X 57. Did you approve of it?

A. I knew nothing about it.

Mr. Thompson: We object to that as wholly immaterial and irrelevant.

Objection overruled. Appeal prayed and granted.

Mr. Meacham:

X 58. Did you know that it was going to be filed?

A. No, sir; I did not. It was filed while I was out of the city.

X 59. Do you approve of it now?

Mr. Thompson: We object to that. That is a most objectionable question.

Mr. Meacham: All right. You object, that settles it.

Mr. Thompson: We are showing what we think about it.

Mr. Meacham: All right, keep on saying what you are thinking.

Mr. Thompson: We will keep on thinking as well as saying.

[fol. 71] Mr. Meacham:

X 60. Do you answer the question?

A. I am not answering the question.

Mr. Thompson: We advise the witness he does not have to answer.

Mr. Meacham:

X 61. Do you decline to answer?

A. Yes, sir. The first I knew of the suit being filed was when I returned to the City, Mr. McDonald told me about it.

X 62. Now, of course, Mr. Iler, you did not negotiate all these loans, or these balances here evidenced, did you?

A. Mr. Meacham, right first hand, I would answer yes.

X 63. From the very beginning to the end?

A. All these particular loans. Now, I might make this explanation, that the $40,500.00 note at the end was originally $45,000.00. When I went to the Lookout Planing Mills they owed the Hamilton National Bank some loans that I did not negotiate in the beginning, but it was decided to put all of those loans in one note and give the bank a mortgage on the property to cover, increas- that loan by a few thousand dollars, I do not know just what the total was. And that was at the time the mortgage was put on the property and the note was $45,000.00. It was afterwards cut down to $40,500.00.

X 64. That was the big note?

A. That was the big note, yes.

X 65. Now, these several notes that you have testified interest was paid on, were paid each thirty or sixty days according to the terms, weren't they, and a new note executed?

A. Yes, sir.

X 66. The old note surrendered to you?

A. Yes, sir.

X 67. In other words, at maturity date you took up the old note and executed a new note?

A. That is right.

Mr. Meacham: I believe that is all.

[fol. 72] Redirect examination.

Questions by J. W. Thompson, Esq.:

R. D. 1. As to the real estate note originally for $40,000.00, you never did take that up, did you, Mr. Iler? How was that handled?

A. Oh, yes, that note was taken up. At the same time when we would take a new note down there they would give us the old note marked paid. We were trying to reduce it, and did reduce it from $45,000.00 to $40,500.00.

R. D. 2. So that the Bank did not hold the original note when the Lookout Planing Mills went into bankruptcy, but held some successive renewal of that note?

A. Yes, sir.

R. D. 3. You say you negotiated the $45,000.00 loan, yourself, with the Hamilton National Bank?

A. Yes, sir.

R. D. 4. And on behalf of the Lookout Planing Mills agree to pay seven per cent interest for that loan?

Mr. Meacham: We object.

Object overruled. Appeal prayed and granted.

Mr. Thompson:

R. D. 5. What rate of interest did you agree to pay on that loan?

A. I do not know that there was any particular agreement as to the amount of interest we were to pay, but merely stating it according to our records, we paid seven per cent.

R. D. 6. Mr. Meacham in one of the earlier questions asked you, said something about the taxes being in arrears and asked whether or not the amount you paid was in taxes, commissions, something of that kind. I will ask you if anything was ever said to you in your negotiations or dealings with the bank at the time you paid,——

Mr. Meacham: I object to that as leading.

Objection overruled. Appeal prayed and granted.

Mr. Thompson:

R. D. 7. I will ask you if anything was or was not said about any amount you paid being applied on anything [fol. 73] except the discount?

A. No, sir.

R. D. 8. In many cases did you or not indicate on the note itself it was to apply as interest on the note?

A. Yes, sir.

Mr. Meacham: We object to that, because leading.

Objection overruled. Appeal prayed and granted.

Mr. Thompson:

R. D. 9. Has or not anything at any time ever been said by any official, agent or representative of the bank to you, with respect to applying any of these payments except as you indicated on your checks?

A. No, sir.

R. D. 10. Mr. Iler, you have testified as to certain checks which you gave to the Hamilton National Bank. Did you or not deliver those checks to the bank for the purpose of paying interest from month to month, as you have testified?

A. Yes, sir.

Mr. Meacham: We object. That would be a conclusion of the witness and not admissible.

Mr. Thompson: Yes, it would.

Mr. Meacham: Yes, his purpose.

Mr. Thompson: A man has a right to direct payment.

Mr. Meacham: He can say what he did.

Objection overruled. Appeal prayed and granted.

Mr. Thompson:

R. D. 11. Mr. Iler, when you would hand the check with the endorsement on the back of it showing the purpose for which you tendered the check, was any question ever made as to your intention, as to what that check should be applied to?

A. No, sir.

Mr. Thompson: That is all.

Further this deponent saith not.

Sworn to and signature waived before me on the 17th day of December, 1935, Chas. M. Fain, Notary Public. (Seal.)

fol. 74] IN CHANCERY COURT OF HAMILTON COUNTY

[Title omitted]

ORDER AMENDING BILL & PLEADINGS—February 24, 1936

Upon motion of the complainant, it is ordered that the original bill and all other pleadings filed in this suit be amended so as to change the initials of the complainant wherever his name appears in the original bill or any other pleadings so as to read "C. H. McCollum" instead of "C. C. McCollum".

By inadvertence the initials in the original pleadings were written "C. C." instead of Mr. McCollum's true initials which are "C. H."

IN CHANCERY COURT OF HAMILTON COUNTY

MEMO—Filed March 6, 1936

In this cause the complainant, C. C. McCollum, Trustee, is Trustee in Bankruptcy for the Lookout Planing Mills, a corporation under the laws of Tennessee, which has been declared a bankrupt, and the suit is brought charging that the defendant, Hamilton National Bank, collected from the said Lookout Planing Mills within two years next before the bringing of the suit the sum of $5235.55, and that said interest was paid on a basis above the legal rate of interest, and seeks to recover $10,471.10. The defendant does not dispute the fact that it collected said amount of interest, nor that it charged usurious interest.

This cause was before the court on a demurrer and the court overruled the second ground of demurrer with leave to rely on same at the hearing. The second ground of demurrer was as follows:

[fol. 75] "Because the bill seeks to recover the penalty provided by Section 5198, United States Revised Statutes, Section 86, Title 12, U. S. C. A., and said penalty does not constitute assets or property recoverable by a Trustee in Bankruptcy."

The court has devoted much time to determine whether or not under Section 70 of the Bankrupt Act this right of recovery of the penalty vested in the Trustee in Bankruptcy.

In other words whether or not a claim for penalty was assignable. The greater volume if not the greater weight of authority of the Federal Court is to the effect that when the Lookout Planing Mills was adjudicated a bankrupt the right of action for a penalty became vested in the Trustee in Bankruptcy, and the court therefore, holds that the complainant has a right under Section 70 of the Bankrupt law to bring suit and recover double the amount of interest paid within two years next before the bringing of the suit, and the complainant will be entitled to a judgment therefor.

The next question raised by the defendant, Hamilton National Bank, is that it has a right to set off the balance due to it by the Lookout Planing Mills against said amount, and specially after a judgment has been rendered thereon.

Whether or not the right of set-off applies depends upon the State statute. The statute of Tenneseee with regard to set-off is Section 8769 of the Code of Tennessee, which reads as follows:

"8769. 4640 (2919). Set-off of mutual debts of a different nature. Mutual debts, though of a different nature, between the parties to a suit, or between the testator or intestate of both or either party, may be set off against each other by being pleaded in bar, or in discharge of the action, either wholly or in part, as the case may be. And if either debt arose by reason of a penalty, the sum intended to be set off [fol. 76] shall be pleaded in bar, setting forth what is justly due on either side."

This section of the Code permits set-off of a debt which arose by reason of a penalty. When this debt becomes a judgment, the court is of the opinion that it is the same as any other judgment, and subject to set-off under this section of the statute.

In the case of Barbour vs. The Bank, in Ohio, it was where a receiver for a bankrupt brought suit and obtained a judgment, and held that although the statute, 5075 of the Revised Statute of Ohio, did not provide for one set-off against another in terms, but the court held that judgments were subject to set-offs against each other, and that even a judgment for a tort is subject to a set-off. Barbour vs. Bank, 50 Ohio State, P. 90.

Under the statute in the state of Pennsylvania, in the case of Lebanon National Bank vs. Karmany, they held that in

a suit the defendant cannot set off a judgment held against it by the complainant, and that was the question involved in that suit, but they went further and stated that after recovery of the judgment by the plaintiff the court could not set off one judgment against the other. The statute of the state of Pennsylvania, which is known as a Defalcation Act, applies where parties are indebted to each other upon bills, bargains, accounts, promises, or the like, and does not apply to penalties as does the statute in Tennessee.

"Payments of illegal interest to a national bank on the renewal of a note on which usurious interest had been charged cannot, in an action by the bank on the note, be treated as payments on the principal debt, as, even though the receipt of such payments exposed the bank to a penal action if it had been reasonably brought within two years, [fol. 77] it could not be compelled to apply money thus received as interest to a purpose not contemplated by either party at the time the payments were made. After a judgment for twice the amount of illegal interest paid to a national bank has been recovered it may be set off against a judgment in favor of the bank, as in case of any other judgment. So, a judgment in favor of the receiver of a corporation against a national bank for twice the amount of interest unlawfully taken by the bank, is subject to a set-off in favor of the bank of judgments thereafter recovered by the bank on the note on which the usurious interest was taken."

3 R. C. L. Page 675.

The Court is, therefore, of the opinion that the defendant has a right of set-off in this cause against said judgment and a decree will be drawn accordingly.

J. L. Foust, Chancellor.

IN CHANCERY COURT OF HAMILTON COUNTY

[Title omitted]

FINAL DECREE AND ORDER GRANTING APPEAL—March 14, 1936

This cause came on this day to be heard before the Hon. J. L. Foust, Chancellor, upon the motion of complainant for leave to amend the original bill of record to show that

the correct name of the complainant is C. H. McCollum, instead of C. C. McCollum, as originally averred; and it appearing to the satisfaction of the Court that the correct name of the complainant is C. H. McCollum, the amendment was duly allowed, and the original bill is accordingly amended of record, to show that C. H. McCollum, Trustee in Bankruptcy of the Lookout Planing Mills, is the correct [fol. 78] name of the complainant herein.

The cause then came on to be heard before the Hon. J. L. Foust, Chancellor, whereupon defendant, Hamilton National Bank, called up for action by the Court the second ground of its demurrer, formerly overruled by the Court with leave to rely thereon at the hearing, and same was finally overruled by the Court, to which action of the Court defendant excepted.

Thereupon, the cause came on to be further heard upon the original bill, the answer and cross-bill of defendant, the answer to the cross-bill, the proof on file, and the entire record in the cause, from all of which the Court was of the opinion, for the reasons stated in his Memorandum Opinion filed, and made a part of Lookout Planing Mills complainant, C. H. McCollum, Trustee became vested, under Section 70 of the Bankruptcy Act, with the right to sue for and recover penalty of double the amount of interest received by defendant within two years next before the bringing of this suit; that defendant, Hamilton National Bank, during said two-year period, knowingly took and received, and the Lookout Planing Mills paid to defendant, interest and discounts at a rate in excess of six per cent to an amount aggregating $5235.55, and that the complainant, as Trustee in Bankruptcy of said Lookout Planing Mills, was entitled to have and recover of and from the defendant twice the amount of such interest payment, or $10,471.10.

It is therefore ordered, adjudged and decree- that said C. H. McCollum, as Trustee in Bankruptcy of said Lookout Planing Mills, have and recover of and from the defendant, Hamilton National Bank of Chattanooga, the sum of $10,-471.10, together with the costs of the cause.

But, it further appearing to the Court that the Lookout Planing Mills was, at the time of its adjudication as a bankrupt, and is now, indebted to the defendant, Hamilton National Bank, in the sum of $25,493.70, as averred in the cross- [fol. 79] bill and as shown by the proof; and the Court being of opinion that said Hamilton National Bank is en-

titled to have the judgment against it in favor of the complainant as Trustee in Bankruptcy set off as against, or applied as a credit upon said indebtedness of the bankrupt to it:

It is accordingly ordered, adjudged and decreed that the judgment herein above awarded complainant, in the sum of $10,471.10, be, and the same hereby is, applied as a set-off against or a credit upon said indebtedness of $25,493.70 owing by the bankrupt to said Hamilton National Bank at the time of its adjudication as a bankrupt.

The complainant, C. H. McCollum, Trustee, again excepts to and prays an appeal to the next Term of the Court of Appeals at Knoxville from so much of the interlocutory decree of the Court entered on, to-wit, November 25, 1935, as sustains the first ground of the demurrer filed by the Hamilton National Bank, wherein the defendant challenged the right of the complainant to bring the suit on the ground that the Trustee in Bankruptcy is not the legal representative of the bankrupt; and complainant likewise excepts to so much and such parts of the foregoing decree as adjudges that the defendant Hamilton National Bank is entitled to set-off or credit the indebtedness of Lookout Planing Mills to it in the sum of $25,493.70, the amount of the judgment hereinabove awarded in favor of complainant and against the defendant in the sum of $10,471.10, and prays an appeal therefrom to the next Term of the Court of Appeals at Knoxville, Tennessee, both of which appeals are granted upon the complainant giving sufficient appeal bond or otherwise complying with the law in such cases. And thereupon Messrs. J. W. Thompson and J. B. Roberts appeared in open Court and acknowledged themselves security for the payment of any costs which might be adjudged against complainant as a result of complainant's said appeal, and the Court accepted these parties as sureties in lieu of other or further security, and the appeals prayed by the complainant are accordingly granted.

[fol. 80] To the action of the Court in not dismissing the cause upon sustaining the first ground of the demurrer, the defendant, Hamilton National Bank, excepts; and to so much and such parts of the decree pronounced and entered in this cause as overruled the second ground of demurrer, and held and adjudged that C. H. McCollum, Trustee in

Bankruptcy, was vested with power and authority, under Section 70 of the Bankruptcy Act, to sue for and recover penalty in this cause; that the defendant took and received illegal interest; that complainant was entitled to recover a penalty of $10,471.10, and awarded judgment, in any amount, in favor of complainant defendant; Hamilton National Bank, excepts and prays an appeal to the next Term of the Court of Appeals at Knoxville, Tennessee, which appeal is granted upon defendant, Hamilton National Bank, giving an appeal bond as required by law. And thereupon C. W. K. Meacham and W. D. Moon appeared in open Court and acknowledged themselves sureties for said appeal, and said sureties being accepted by the Court, the appeal of the defendant Bank was accordingly granted.

[fol. 81] IN COURT OF APPEALS OF TENNESSEE

Hamilton County Equity Cause

No. 5

C. C. MCCOLLUM, Trustee,

vs.

HAMILTON NATIONAL BANK OF CHATTANOOGA

Hon. J. L. Foust, Chancellor

Rankin, Frazier & Roberts and Thompson & Ballard, Chattanooga, Solicitors for Complainant.

Cantrell, Meacham & Moon, Chattanooga, Solicitors for Defendant.

OPINION—Filed August 1, 1936

This is a suit of C. C. McCollum, Trustee in Bankruptcy of Lookout Planing Mills, seeking to recover from Hamilton National Bank the penalty provided by Section 5198, U. S. Revised Statutes, Section 86, U. S. C. A., Title 12. The bill charges that the defendant charged and received from the bankrupt corporation the sum of $5,235.55, and it sought to collect twice that amount, or $10,471.10, under the provision of said Federal statute. By an amendment to the bill it was charged that the indebtedness of the bankrupt

was in excess of the amount sued for and the other assets of the bankrupt, and that the suit was brought for the benefit of creditors.

The defendant interposed a demurrer to the averments of the bill in which it insisted:

First, that the Trustee in Bankruptcy was not the legal representative of the bankrupt and had no right, power or authority to maintain the suit to recover the penalty sued for.

Second, that the penalty did not constitute assets or prop- [fol. 82] erty recoverable by a Trustee in Bankruptcy.

Third, that the bill failed to show any beneficiary entitled to take and share in the recovery sought.

The effect of the third ground of the demurrer was avoided by the amendment to the bill, and the cause was heard on the demurrer. On the hearing the Chancellor sustained the first ground of the demurrer, and overruled the second ground, with leave of the defendant to rely on said — in answer. The defendant filed answer, relying on the second ground of the demurrer. It denied any and all averments of the bill upon which a recovery could be based, and further pleaded its ownership of notes owing by the bankrupt in the sum of $25,493.70 which it offered to set off against complainant's demand. And it also filed its answer as a cross-bill for the purpose of setting up its claim on said notes, and for the purpose of obtaining an order to set same off against the claim of complainant. Complainant answered the cross-bill, denying the right of cross-complainant to a set-off. It was insisted that the right of action prosecuted by complainant was conferred by the Federal Bankruptcy Acts, and that the remedies provided therein were exclusive.

Upon the trial of the cause, defendant renewed its insistence on the second ground of the demurrer, and same was overruled by the Court. And a decree was entered on the entire record in which it was held that C. C. McCollum became vested with the right to sue for and recover the penalty of double the interest received by the bank within two years next before the bringing of this suit. And it was decreed that the aggregate amount so collected by the bank in excess of six per cent was $5235.55, and that the Trustee was entitled to recover twice that amount or $10,471.10.

The Court further found that the bankrupt was, at the time of its adjudication as a bankrupt, indebted to defendant, Hamilton National Bank, in the sum of $25,493.70, and the amount of $10,471.10 for which judgment was allowed was declared as a credit upon the amount due the bank.

[fol. 83] Both parties have prayed and perfected appeals from the decree so entered. Complainant excepted to the action of the Court in sustaining the first ground of demurrer, and to that portion of the decree allowing the bank a set-off of the amount of the judgment against it. Errors have been asigned by complainant on these questions. Defendant excepted to the action of the Court in refusing to dismiss the bill on sustaining the first ground of the demurrer, and also to so much of the decree as denied the second ground of the demurrer, and as held that the Trustee in Bankruptcy was vested with power to sue for and recover the penalty in question; and also excepted to that portion of the decree holding that defendant had collected excessive interest. It has also assigned errors.

We notice first the errors assigned by defendant. It is insisted that the Court erred in not dismissing complainant's bill on sustaining the first ground of demurrer, viz, "Because the complainant, as Trustee in Bankruptcy, seeks to recover the penalty of double the interest paid by the bankrupt within two years provided by Section 5198, U. S. Revised Statutes, Section 86, Title 12, U. S. C. A., whereas the Trustee in Bankruptcy is not the legal representative of the bankrupt and has no right, power or authority to maintain this action and recover said penalty." In this connection it was insisted that complainant could sue only as the legal representative of the bankrupt and that he was not the legal representative of the bankrupt. It is now insisted that the right to recover the penalty provided is a personal right of the debtor and did not pass to the trustee of the bankrupt.

There is some conflict in the holdings of the courts as to whether or not the penalty in question passes to and is recoverable by a Trustee in Bankruptcy of the payor of such interest. The Chancellor held that the Trustee was [fol. 84] not the legal representative of the bankrupt, but that the claim was assignable and passed to the Trustee as a chose in action which was recoverable in a suit by him. We think the action must be maintained, if at all, on the

theory that it was a chose in action and assignable. A Trustee in Bankruptcy is essentially a representative of creditors and not a representative of the bankrupt. But we think it not necessary to pass upon this question to reach a conclusion of the rights of the parties in this case. In this State Actions ex delicto are assignable if they would survive to the personal representative on the death of the injured party. Our State Supreme Court has said, "The test of the assignability of a right of action ex delicto is made to depend by the overwhelming weight of authority on its survivability." * * * "Builded upon these statutes, and aside from specific legislation, the general rule has now come to be that actions ex delicto for injuries to property, as distinguished from actions ex delicto for injuries to persons are assignable," citing 2 R. C. L. 613.

Haynes v. Halliday, 151 Tenn. 119.

"So, in view of the statute of Edward III, which is the law in Tennessee, and Chapter 111 of the Acts of 1877, we may now say that in this State actions ex delicto for injuries to property, both personal and real, survive and are, therefore, assignable.

Idem.

Section 5198, U. S. Revised Statutes, 12 U. S. C. A. Section- 85 and 86 provides: * * * In case the greater rate of interest has been paid, the person by whom it has been paid, or his legal representative, may recover back, in an action in the nature of an action of debt, twice the amount of interest thus paid from the association taking or receiving the same, provided that such action is commenced within two years from the time the usurious transaction occurred."

[fol. 85] It will thus be seen that the right of action is specially preserved for the benefit of the personal representative of the payor of such usurious interest. The statute provides that it may be maintained by the party who paid the excessive interest or his personal representative. Our Supreme Court has said that the test of assignability is the survivability of the action. This being true, we think it must be concluded that the right of action was assignable, and passed to the Trustee in Bankruptcy. It would present a serious problem to hold that a financial institution could charge illegal interest and thereby render a person in-

solvent and bankrupt; that the Trustee in Bankruptcy could not recover for the benefit of creditors funds thus illegally taken together with the legal increments thereof. Certainly the institution receiving the illegal payment would not be permitted to thus profit by its own wrong doing by holding that bankruptcy of the payor destroyed the right to collect. While on the other hand to hold that the bankrupt could collect would operate to make bankruptcy a profitable move in a case like this. We think the right of the Trustee to recover is supported by authority and sound reason. The first assignment or error on behalf of defendant is denied.

It is next insisted by defendant that the penalty sought to be recovered is not property and is, therefore, not recoverable. We think this position is likewise not tenable. Section 70 of the Bankruptcy Act provides that the Trustee shall be vested by operation of law with all, * * * "(3) powers which he (the bankrupt) might have exercised for his own benefit, * * * (6)k, rights of action arising upon contracts or from the unlawful taking or detention of, or injury to, his property." We think the provisions of the statute sufficiently comprehensive to embrace the right of action here asserted. The defendant took assets of the bankrupt unlawfully, and thereby rendered itself liable to [fol. 86] return to the payor or his legal representative twice the amount of money thus taken unlawfully. The Trustee is empowered to do substantially what the bankrupt could have done.

Throckmorton v. Hickman, 279 Fed. 196. Nat. Bank of Com. v. Downie, 218 U. S. 345.

Defendant files a further assignment of error on the finding of the Chancellor that illegal interest was paid. It is not insisted that defendant did not take interest in excess of six per cent. But on the contrary it is shown that it did take the amount claimed in excess of six per cent. The insistence made is that this showing of itself does not prove the allegations of the bill so as to warrant a recovery. The Act of Congress provides:

"Any association may take, receive, reserve and charge on any loan or discount made, or upon any notes, bills of exchange, or other evidence of debt, interest at the rate allowed by the laws of the state, territory, or district where

the Bank is located, or at a rate of 1 percentum in excess of the discount rate, on ninety days commercial paper in effect at the Federal Reserve Bank, in the Federal Reserve District where the bank is located, whichever may be the greater, and no more, except that whereby the laws of the state a different rate is limited for banks organized under state laws, the rate so limited shall be allowed for organizations or existing in such state under this title."

Revised Statutes U. S. Sec. 85. Title 12.

It is not insisted that the discount rate of the Federal Reserve Bank in the District was in excess of six percentum during the period within which the interest was collected. But it is insisted that there will be no presumption in this connection by the Court. In this connection it ap- [fol. 87] pears that the discount rate of the Federal Reserve Banks is made by the Federal Reserve Board, and that this Court is authorized to take judicial notice of its acts. In the case of Caha v. U. S. 152 U. S. 211, the Court held that it was not necessary to formally introduce orders of the Interior Department of the Federal Government, that the Court would take judicial notice of same. It appears from a letter of V. K. Bowman, Assistant Cashier of the Federal Reserve Bank of Atlanta, that the discount rate of the bank from January 10, 1931, to and including January 12, 1935, ranged from 2% to 3½%. On January 14, 1935 an order was promulgated by the Federal Reserve Board fixing the discount rate at 2%, calculated on the basis of 365 days to the year. It will appear from this that the discount rate of the Federal Reserve Bank of the District in which the transaction took place at no time during the time covered by same exceeded that prescribed by the State of Tennessee. Matters of which the Court will take judicial notice may be made to appear by any medium satisfactory to the Court. And we think the rate of discount of the Federal Reserve Bank is made to appear by letter of the Assistant Cashier and the printed circular accompanying same. The third and last assignment of error by defendant will be overruled.

On behalf of complainant it is insisted that the Chancellor erred in sustaining defendant's first ground of demurrer and in holding that complainant was not the legal representative of the Bankrupt. This assignment becomes immaterial in the light of our holding that the claim was

assignable and that the Trustee was empowered to prosecute the suit, and it is not necessary to further consider this assignment.

It is next insisted that the Chancellor erred in permitting the defendant to set-off the judgment awarded in favor of complainant against the claim of defendant. We think it not necessary to indulge in any long discussion of this ques-
[fol. 88] tion. This Court, acting in this case as a court of Equity, is constituted for the purpose of administering justice. And it is a cardinal principle of equity jurisprudence that a court of Equity will do full justice and not by halves. The insistence of complainant would restrict this rule and confine the jurisdiction of the Court in the instant case to the application of a legal formula, rather than an administration of justice. It cannot be insisted that it would be equity to force defendant to pay in excess of ten thousand dollars to the complainant in this case, while the party in whose shoes he stands owes defendant more than twenty-five thousand dollars. By pursuing this procedure defendant would stand to lose the entire amount of its notes and possibly the greater portion of the amount so paid by it on the judgment rendered, depending on the indebtedness of the bankrupt, and the possibility of dividends defendant might collect on the filing of its claim. This is not the course of an equitable administration of justice. And since complainant has sought the forum of the Chancery Court for the enforcement of his claim he must abide by the rules of the forum wherein he has elected to conduct his contest. He will not be permitted to seek the aid of a court of conscience and be unconscionable in his demands. And we think the granting of his request would be unconscionable. This Court is familiar with the fact that considerable expense results from the administration of an estate in bankruptcy, and that these expenses are first paid before any declaration of a dividend. It might be easily conceived of a situation where the fund sought to be collected here would be consumed in the payment of expenses of administration, and the entire amount lost to defendant.

We think defendant was entitled to prosecute a cross action in the Chancery Court for the purpose of obtaining a set-off. It is provided by legislative enactment in Ten-
[fol. 89] nessee that a defendant may plead by way of set-off or cross action:

"(1) * * * Mutual demands held by the defendant against plaintiff at the time of action brought, and matured when offered in set-off.

(2) * * * Any matter arising out of the plantiff's demand, and for which the defendant would be entitled to recover in a cross action.

(3) * * * Any matter growing out of the original consideration of any written instrument, for which the defendant would be entitled to recover in a cross action.

(4) * * * Any equities between the defendant and the original party under whom the plaintiff claims, which by law have attached to the demand in the plaintiff's hands, and for which the defendant would be entitled to a recovery against such original party."

Tennessee Code, 1932, Sec. 8768.

It has been held that the right of set-off is available to resist the claim of an assignee of an insolvent creditor. And the complainant in this suit stands in the attitude of an assignee of an insolvent creditor.

"The debtor of an insolvent creditor who has assigned for the benefit of creditors the obligation evidencing the indebtedness, may set off against the demand in the hands of the assignee any indebtedness, whether matured or unmatured at the date of assignment."

Nolan Bros. Lbr. Co. v. Dudley, 128 T. 11.

And "Technical objections, which would be valid at law, will not avail to defeat equitable set-off".

Idem.

And it has been held that the right of equitable set-off may be enforced independently of the statutes, where from [fol. 90] the nature of the claim or the situation of the parties it is impossible to obtain justice by plea or cross-action.

Knafli v. Knoxville Banking etc. Co., 128 T. 181.

We think there was no error in the action of the Chancellor in permitting the claim of set-off. There is nothing in the provisions of the U. S. Statute relied upon by complainant restricting the power of the Chancery Court to do jus-

tice. In this connection it is insisted that the Bankruptcy Court had obtained jurisdiction of the estate of the bankrupt, and that it retained exclusive jurisdiction of any right of set-off by defendant. We think it a sufficient answer to this insistence to say that the Bankruptcy Court did not acquire jurisdiction of the suit before us. And complainant having elected to pursue his remedies in the Chancery Court, and having voluntarily submitted to its jurisdiction, he must abide by its lawful orders.

In this connection it is insisted that the right of set-off could not be invoked so as to defeat the lien of solicitors bringing this suit. By Section 8035 of the Code of Tennessee it is provided:

"Attorneys and solicitors of record who begin a suit in a court of record shall have a lien upon the plaintiff's or complainant's right of action from the date of the filing of the suit."

In considering the basis of the lien of an attorney our State Supreme Court said:

"An attorney may be entitled to assert a lien upon a judgment which he has represented his client in obtaining, but a principal basis for allowing a lien to an attorney at law is that it is deemed both natural and wise that the lawyer be secured in the fruits of his professional labor, since the [fol. 91] proper administration of justice is essential to the well being of the public, which cannot be secured without an intelligent and prosperous bar."

Stansell v. Rosch, 147 Tenn. 183.

Applying the reasoning in the above cause to the instant case, it would seem that the lien of solicitors prosecuting the suit to judgment should be superior to the right of set-off on behalf of defendant. Without the institution and prosecution of the suit by complainant's solicitors no judgment would have been obtained. The right to reduce the claim of defendant against the bankrupt estate would not have been available if it had not been for the services of solicitors for complainant. To deny them compensat- by way of a lien in the cause would be, in effect, to take advantage of their services without compensation. And at the same time it would encourage a continuation of the practice of demanding unlawful interest.

The general rule of set-off as stated in Corpus Juris is as follows: "Except where the right of setting off one judgment against another is conferred by express statute, it is well settled that an attorney's lien is superior to the right of the parties to set off judgments recovered by them respectively against each other in different actions, the reasons being that the set-off will destroy the judgment to which the lien has attached.

6 C. J. 793.

The Supreme Court of this State, in the case of Roberts v. Mitchell, 94 Tenn. 277, stated the rule of set-off as follows:

"We think the better and more equitable rule is the one that subordinates the right of set-off independent judgments [fol. 92] rendered in different suits, growing out of different causes of action, to the attorney's lien or claim for services rendered in the particular suit; and we do not hesitate to adopt it as the rule of practice in this state."

It is true that the claim of defendant which it seeks to set off against the judgment in this cause is not entirely a separate matter, but it must be borne in mind that defendant has no judgment entitling it to a statutory set-off. Its right to set-off must rest upon principles of equity, and is in the nature of the right of subrogation. The right of solicitors for complainant attached to the judgment and related back to the beginning of the suit. While on the other hand the right of defendant and cross-complainant was a mere right at that time. The Supreme Court of Tennessee has described this right as, "Not a jus ad rem but a jus in re." And that the right of set-off is a floating equity until action by a court is invoked.

Milan v. Milan, 138 Tenn. 686.

The right of solicitors for complainant became fixed upon the filing of the suit by reason of the provisions of the statute, and could not be defeated otherwise than by some superior right or equity. At the time of the attaching of the right of complainant's solicitors, the right of cross-complainant to a set-off was a floating equity only, and was not a fixed right. It did not become a fixed right until the entry of the decree in the cause. And this right was based on the theory that it would be inequitable to force it to pay the full amount of the judgment against it while unpaid notes remained in its

hands. Under the peculiar facts in this case, we think the right of solicitors superior to the right of set-off, and that this right is not dependent upon payment out of the *nte* amount of judgment remaining after allowing the set-off sought. This is not a case where two parties have mutual [fol. 93] demands, which may be set off as a matter of course against each other, and is not governed by the ordinary rules applicable in such cases. We think public policy demands that the lien of solicitors for prosecuting this suit be preserved and protected against the claim of set-off, and that the action of the Chancellor in denying same was error. The cause will be remanded to the Chancery Court of Hamilton County for the purpose of determining what would be a reasonable fee for solicitors for their services in the cause.

Ailor, Judge.

[fol. 94] IN COURT OF APEALS OF TENNESSEE

[Title omitted]

DECREE—August 1, 1936

This cause came on to be heard before the Honorable Court of Appeals on the transcript of the record from the Chancery Court of Hamilton County, Tennessee; the assignments of errors by the complainant and by the defendant; and the argument of counsel for the parties, from consideration of all of which it was, on August 1, 1936, for the reasons stated in its written opinion attached to and made a part of the record in this cause, ordered, adjudged and decreed by the Court as follows:

(1) That the asignment of errors by defendant is not well taken, and the same is, therefore, overruled.

(2) That the first assignment of error by complainant is not well taken, and is, therefore, overruled.

(3) That the second assignment of error by complainant is sustained to the extent that the set-off allowed by the Chancellor shall be subject and inferior to a reasonable fee of complainant's solicitors of record, but is in all other [fol. 95] respects overruled.

It is further ordered, adjudged and decreed by the Court that the cause be, and the same hereby is remanded to the

Chancery Court of Hamilton County, Tennessee, for a reference, to determine what would be a reasonable fee for solicitors of complainant for their services in this cause.

(Signed.) Ailor, Judge.

[fol. 96] IN SUPREME COURT OF TENNESSEE

ASSIGNMENTS OF ERROR

(1) The learned Court of Appeals erred in overruling and disallowing complainant's first assignment of error to the effect that the Chancellor was in error in sustaining defendant's first ground of demurrer and in holding and decreeing that complainant was not the legal representative of the bankrupt, and that he could not as such legal representative recover the penalty prescribed by the statute relied upon. (Chancellor's Opinion, R., pp. 9, 10; Decree on Demurrer, R., pp. 12, 13.)

Opinion, Court of Appeals, p. 7; Decree, Court of Appeals.

This was manifest error to the prejudice of complainant. By the greater weight of authorities, a trustee in bankruptcy is the legal representative of a bankrupt person, firm or corporation, and such trustee alone has the right to maintain an action under sections 5197, 5198, U. S. Revised Statutes. Our position on this question is more fully set forth in the accompanying brief and argument.

(2) The Court of Appeals was correct in concurring in the action of the Chancellor in awarding complainant judgment for $10,471.10; and the Court of Appeals was likewise correct in modifying the judgment of the Chancellor to the extent of decreeing that solicitors for complainant had a lien upon this judgment for their reasonable fees. But that Court erred in further decreeing that, subject to this lien of solicitors, defendant was entitled to apply the judgment in favor of complainant as a credit upon, or set-off against, the indebtedness of the bankrupt to it. (Opinion of Chancellor, R., pp. 60, 61, 62; Decree of Chancellor, R., pp. 63, 64.)

Opinion, Court of Appeals, pp. 7-11; Decree, Court of Appeals.

[fol. 97] The action of the Court of Appeals in allowing defendant the right to apply any part of the judgment as a credit upon, or a set-off against, the indebtedness of the bankrupt to it was manifest error to the prejudice of complainant trustee for the following reasons, among others:

(a) This action was brought by the trustee in bankruptcy under the express provisions of Section 5198 U. S. Revised Statutes (12 U. S. C. A., Section 86), especially and exclusively for the purpose of recovering the penalty therein provided; and complainant had the right to have the case disposed of on the sole issue of the guilt or innocence of the defendant, without any extraneous matter, such as set-off, recoupment or counter-claim, being injected therein. The method of pleading prescribed by the statute must be followed.

(b) The plain mandate of the federal statute cannot be set aside by considerations falling within general equitable principles, notwithstanding State courts have concurrent jurisdiction of the subject matter of the action.

(c) Upon the filing of the petition the bankruptcy court obtained jurisdiction of the estate of the bankrupt, and it had and retained exclusive jurisdiction of any right of set-off claimed by defendant. Neither the trustee nor the bankruptcy court itself has power to divest the bankruptcy court of this exclusive jurisdiction.

(d) The right to set-off depends upon mutuality of debts or credits, which must be of the same nature and in the same right. These essential elements are lacking.

(e) The Court of Appeals correctly and properly held that defendant "has no judgment entitling it to a statutory set-off," and that its right to an equitable set-off was imperfect; it was "a floating equity only," which did not be-[fol. 98] come fixed until the entry of the decree in the cause. Under the express provisions of Section 47a (2) of the bankruptcy act the trustee stood in the attitude of a creditor holding an execution or other lien by legal or equitable proceedings levied against the claim penalty. The right of the trustee must therefore prevail over the imperfect, "floating equity" of the defendant.

(f) The Chancellor (Opinion, R., p. 61) and the Court of Appeals concur in holding that the right of defendant

to apply any part of the penalty in reduction of its claim against the bankrupt was not available until complainant reduced the claim to judgment. It must follow, under the express holdings of the Supreme Court of the United States and of this Court, that defendant has no right of set-off, which must be determined upon the status existing as of the date of the filing of the petition. Such right cannot be predicated upon any status existing after the filing of the petition, nor upon any subsequent action taken by either party to the transaction.

These matters are more fully set forth, with supporting authorities, in the brief and argument herewith submitted.

[fol. 99] ASSIGNMENT OF ERRORS

I

The Court of Appeals was in error in affirming the action of the Chancellor in not dismissing complainant's bill on sustaining the first ground of the demurrer, reading as follows:

"Comes defendant, Hamilton National Bank, and demurs to the bill in this cause:

"Because the complainant, as Trustee in Bankruptcy, seeks to recover the penalty of double the interest paid by the bankrupt within two years provided by Section 5198, U. S. Revised Statutes, Section 86, Title 12, U. S. C. A., whereas, the Trustee in Bankruptcy is not the legal representative of the bankrupt and has no right, power or authority to maintain this action and recover said penalty."

The complainant could sue for the penalty only as the legal representative of the bankrupt, and the Court's holding that he was not the legal representative, the bill should have been dismissed.

Demurrer, r. p. 8; Decree, R., p. 12, 13.

II

The Court of Appeals was in error in affirming the action of the Chancellor and overruling the second ground of the demurrer, reading as follows:

"Because the bill seeks to recover the penalty provided by Section 58, U. S. Revised Statutes, Title 12, U. S. C. A.,

and said penalty does not constitute assets or property recoverable by the Trustee in Bankruptcy";

and holding that complainant, as Trustee in Bankruptcy, was vested with power and authority, under Section 70a of the Bankruptcy Act, to sue for and recover the penalty in this case, because the Trustee in Bankruptcy is not the legal representative of the bankrupt, and because the penalty does [fol. 100] not constitute assets or property recoverable by the Trustee in Bankruptcy.

Demurrer, R. p. 8; Decree, R. p. 62, 63.

III

The Court of Appeals was in error in affirming the Chancellor and holding and decreeing that defendant knowingly took and received illegal interest, and that complainant was entitled to recover a penalty of $10,471.10.

This was error, because,

(a) The Trustee in Bankruptcy had no right, power or authority to maintain this suit for a penalty, said penalty not being property of the bankrupt or assets of the bankrupt, recoverable by a Trustee in Bankruptcy.

(b) Because Section 70a of the Bankruptcy Act did not convert the penalty provided by the Banking Act into property assets of the bankrupt, recoverable by a Trustee in Bankruptcy for the use and benefit of creditors of the bankrupt.

(c) Because the complainant did not in his bill, as a condition to recover of the penalty, pay, or offer to pay the bankrupt's indebtedness to the Bank. The complainant having invoked the Court of Equity, must do equity, by first paying, or offering to pay the bankrupt's indebtedness to the Bank.

(d) Because the bill does not allege, and the proof does not show that seven per cent charged and collected was illegal or excess interest within the contemplation of Sec. 5198 of the U. S. Revised Statutes, Sec. 86, 12 U. S. C. A.

(e) Because it is not shown that the Bank knowingly took and received excess interest.

Decree, R. 62-64; Opinion, R. 60.

[fol. 101] IV

The Court of Appeals was in error in modifying the decree of the Chancellor and holding and decreeing that the right of set-off allowed on behalf of defendant shall be subject and inferior to the reasonable fees of complainant's solicitors in this cause.

Opinion and decree of the Court of Appeals.

[fol. 102] IN SUPREME COURT OF TENNESSEE

C. C. McCOLLUM, Trustee,

vs.

HAMILTON NATIONAL BANK OF CHATTANOOGA

ORDER GRANTING WRITS OF CERTIORARI—Filed March 5, 1937

In this cause the Court is pleased to grant both petitions for writs of certiorari, and the cause is placed on the docket for argument.

(Signed) Grafton Green. D. W. DeHaven. Wm. L. Cook.

[fol. 103] IN SUPREME COURT OF TENNESSEE

[Title omitted]

OPINION—Filed May 24, 1937

By the bill C. C. McCollum, trustee in bankruptcy of Lookout Planing Mills, a corporation that has been adjudged a bankrupt, seeks to recover the penalty provided by section 86 of the National Banking Act, section 5198 of the United States Revised Statutes, which is as follows:

"The taking, receiving, reserving, or charging a rate of interest greater than is allowed by the preceding section, when knowingly done, shall be deemed a forfeiture of the entire interest which the note, bill, or other evidence of debt carries with it, or which has been agreed to be paid thereon. In case the greater rate of interest has been paid, the person by whom it has been paid, or his legal repre-

sentatives, may recover back, in an action in the nature of an action of debt, twice the amount of the interest thus paid from the association taking or receiving the same: Provided, That such action is commenced within two years from the time the usurious transaction occurred."

The Chancellor and the Court of Appeals concurred in [fol. 104] finding that the bankrupt had paid to defendant within two years prior to the filing of the bill herein usury or unlawful interest in the sum of $5,235.55, and entered decrees for double that sum. We find ample evidence to support this concurrent finding.

We are further of the opinion that the trustee had authority to institute and prosecute this suit under section 70(a) of the Bankruptcy Act, which provides as follows:

"The trustee of the estate of a bankrupt, upon his appointment and qualification, and his successor or successors, if he shall have one or more, upon his or their appointment and qualification, shall in turn be vested by operation of law with the title of the bankrupt, as of the date he was adjudged a bankrupt, except in so far as it is to property which is exempt, to all * * * (6) rights of action arising upon contracts or from the unlawful taking or detention of, or injury to, his property."

Our conclusion as to this authority is supported by the following cases: Reed v. American-German National Bank, 155 Fed., 233; Crocker v. First National Bank, 4 Dillon, 358, Fed. Cas. No. 3397; Ripple v. Mortgage, etc., Corp., 193 N. C., 422, 137 S. E., 156; Lasater v. First National Bank, 96 Tex., 345, 72 S. W., 1057; Monongahela National Bank v. Overholt, 96 Pa., 327. In Tiffany v. National Bank, 18 Wallace, 409, 21 L. ed., 862, it was assumed that the trustee could maintain a suit for this penalty, although the case was decided in favor of the bank upon the ground that it had not collected illegal interest. We have been referred to no case in which a contrary decision was announced. In holding that the trustee is vested with such right of action [fol. 105] the opinions in the foregoing cases direct attention to the broad and comprehensive language of the Bankrupt Act, which they state is ample to include the entire estate of the bankrupt, except exemptions which are intended to protect him and his family from temporary distress.

It further appears from the record that the bankrupt is indebted to the defendant, out of the transactions in which this unlawful interest was paid, in the sum of $25,493.70. The defendant, both by plea and cross-bill, asks that this indebtedness be set off against any recovery which may be decreed complainant in this cause. Such relief was properly decreed the defendant by both the chancellor and the Court of Appeals. Section 68 (a) of the Bankrupt Act provides as follows:

"In all cases of mutual debts or mutual credits between the estate of a bankrupt and a creditor the account shall be stated and one debt shall be set off against the other, and the balance only shall be allowed or paid."

In 7 C. J., 143, the rule as to set-off in such cases is thus stated:

"A person who is indebted to the bankrupt is entitled, as against the trustee, to assert and enforce any set-off or counterclaim which he may have and which he might have asserted and enforced as against the bankrupt, and if the claim is such as would be provable against the estate, the fact that proof thereof has not been made does not affect his right to assert it as a set-off or counterclaim in an action against him by the trustee to recover his indebtedness to the bankrupt. But the Bankruptcy Act was not intended to enlarge the doctrine of set-off and does not give a party rights which he did not enjoy under previous statutes or [fol. 106] general equitable principles. The claims must of course be against the bankrupt, and must belong to the debtor who seeks to have it set off."

In 55 L. R. A., 34, the annotator makes this statement:

"Set-offs have been allowed in bankruptcy cases much more freely than in ordinary cases of set-off, the principal reason being that it seemed unjust to make one pay his own debt to the bankrupt in full, and receive only a dividend on the debt due from the bankrupt to him."

In 57 C. J., 361-362, it is said:

"To be complete, a definition of 'set-off' must embrace equitable set-off. A court of equity, or a court possessing

equitable jurisdiction, has inherent power, as a part of its general jurisdiction, to allow or compel a set-off. This power is independent of statutes allowing a set-off; it was recognized and exercised prior to the enactment of such statutes; and it has not been taken away by their enactment, nor affected by their repeal."

Our own statute expressly authorizes such set-off, same being section 8769 of the Code, which is as follows:

"Mutual debts, though of a different nature, between the parties to a suit, or between the testator or intestate of both or either party, may be set off against each other by being pleaded in bar, or in discharge of the action, either wholly or in part, as the case may be. And if either debt arose by reason of a penalty, the sum intended to be set off shall be pleaded in bar, setting forth what is justly due on either side."

The complainant, having invoked the jurisdiction of a court of equity, will be required to do equity by having his claim credited on the larger one owing to the defendant. [fol. 107] Counsel insist that since a debtor when sued by a national bank cannot offset same with the penalty provided by section 68 of the National Banking Act (Barnet v. Muncie National Bank, 98 U. S. 555, 25 L. ed. 212; Bank v. Hunter, 109 Tenn. 91) that where the situation is reversed the bank should not be permitted to offset its debts against the penalty. There is an obvious distinction in the two cases. Section 86 of the Banking Act, being of a penal nature, is to be strictly construed. Fiffany v. National Bank, 18 Wallace 409, 21 L. ed. 682. The form of remedy for its enforcement is therefore exclusive. Barnet v. Muncie National Bank, supra; 25 C. J. 1185. It necessarily follows that the penalty can only be recovered in an independent action of debt, as directed in the act. Having obtained a decree for the penalty, there is no provision in the Banking or Bankruptcy Acts restricting or prohibiting the bank from offsetting same with any just debt owing to it by the bankrupt, and, as previously stated, this is expressly authorized by our statute.

Complaint is made of the allowance by the Court of Appeals of a lien on the decree herein in favor of complainant for counsel fees. Section 8035 of the Code provides as follows:

"Attorneys and solicitors of record who begin a suit in a court of record shall have a lien upon the plaintiff's or complainant's right of action from the date of the filing of the suit."

The question thus raised is whether the attorneys' lien or the set-off has priority. Upon this question there is much conflict in the authorities. Am. Jur., vol. 5, p. 399; Roberts v. Mitchell, 94 Tenn. 277. In the last-named case this court quoted approvingly from the opinion of Chancellor Walworth in Dunkins v. Vandenburgh, 1 Paige Ch., 624, as follows:

[fol. 108] "The question in all these cases is, What is equitable and just between the parties and the attorney or solicitor? Where different claims arise in the course of the same suit, or in relation to the same matter, it is undoubtedly equitable and just that these equities should be arranged between the parties without reference to the solicitor's or attorney's lien. His lien is only on the clear balance due to his client after all these equities are settled. But when other claims, arising out of different transactions, and which could not have been a legal or equitable set-off in that suit, exist between the parties, the Court ought not to divest the lien of the attorney or solicitor which has already attached on the amount recovered for the costs of that particular litigation. When the solicitor has been at the labor and expense of prosecuting a suit, it is equitable and just that his costs should be paid out of that litigation."

Applying the rule thus announced to the facts of this cause, it must be held that solicitors for complainant are not entitled to the lien decreed them by the Court of Appeals, since the claims of both parties arose in the same suit and relate to the same matter. Section 8775 of the Code, invoked by solicitors for complainant, is not applicable. It is as follows:

"Judgments of the same court may be set off against each other on motion, but not so as to defeat liens of attorneys or to circumbent the exemption laws."

This statute simply embodies the decision of this court in Roberts v. Mitchell, supra, and applies where there are two independent judgments or decrees. In this cause de-

fendant has no decree against complainant, or the bankrupt; it has merely established its claim so as to have it [fol. 109] offset against the decree awarded complainant herein. Solicitors for complainant will have to look to the bankrupt estate for their compensation.

With modification as to lien for solicitors' fees, the decree of the Court of Appeals will be affirmed. The costs will be divided.

McKinney, Judge.

[fol. 110] IN SUPREME COURT OF TENNESSEE

C. C. McCOLLUM, Trustee,

vs.

HAMILTON NATIONAL BANK

DECREE—Filed June 4, 1937

Be it Remembered, That this cause came on to be heard before the Honorable Supreme Court of Tennessee, upon the transcript of the record from the Chancery Court of Hamilton County, Tennessee, the decree of the Court of Appeals, the petitions for certiorari from the decree of the Court of Appeals, assignments of errors, and briefs of counsel; and upon consideration of all of which it appears to the Court, for the reasons stated in the Opinion of the Court, which is made a part of the record in this cause, that the Trustee in Bankruptcy had authority to institute and prosecute this suit under Section 70 (a) of the Bankruptcy Act; that the decrees of the Chancellor and the Court of Appeals, awarding complainant a recovery of $10,471.10 as a penalty for taking excess interest, was supported by the evidence; that it appearing from the record that the bankrupt is indebted to the defendant, out of the transactions in which said unlawful interest was paid, in the sum of $25,493.70, and that defendant, both by plea and crossbill, having asked that said indebtedness be off-set against any [fol. 111] recovery for the penalty, relief by set-off was properly decreed the defendant by both the Chancellor and the Court of Appeals; and that, since the claims of both parties arose in the same suit and relate to the same matter, solicitors for complainant are not entitled to the lien for at-

torneys' fees decreed them by the Court of Appeals, but must look to the bankrupt estate for their compensation.

It is, therefore, ordered, adjudged and decreed that the decree of the Court of Appeals be affirmed, with the modification that the lien for fees decreed to complainant's solicitors shall be reversed, and disallowed. The costs of the cause will be paid, one-half by complainant and his sureties, and one-half by defendant and its sureties, on appeal bonds, for all of which costs execution may issue.

(Signed) Grafton Green. Colin P. McKinney. D. W. DeHaven.

[fol. 112] IN THE SUPREME COURT OF TENNESSEE

[Title omitted]

PRÆCIPE FOR TRANSCRIPT OF RECORD

To S. E. Cleage, Esq., Clerk of the Supreme Court, Knoxville, Tennessee:

You are hereby requested to make a transcript of the record in this cause to be filed in the office of the Clerk of the Supreme Court of the United States, in connection with the petition of C. C. McCollum, trustee, for writ of certiorari to review the decree of this Court herein, and to include in such transcript of record the following, and no other papers or exhibits unless so requested by defendant, to-wit:

1. Original bill.
2. Demurrer of defendant.
3. Order amending bill of record.
4. Memo of Chancellor.
5. Decree on Demurrer.
6. Answer and cross bill.
7. Answer to cross bill.
8. Deposition of C. H. McCollum, with exhibits "A" to "G", inclusive.
9. Deposition of Walter Iler; the exhibits to this deposition need not be copied, unless request therefor is made on behalf of defendant.

[fol. 113] 10. Order amending bill and pleadings, correcting name of complainant, enrolled February 24, 1936.

11. Memo of Chancellor.

12. Final decree of Chancellor, granting appeal, enrolled March 24, 1936.

13. Opinion of Court of Appeals.

14. Decree of Court of Appeals.

15. From the petition of C. C. McCollum, trustee, to Supreme Court for certiorari, the assignments of error appearing upon pages 10, 11 and 12 thereof.

16. From the petition of Hamilton National Bank to Supreme Court for certiorari, the Clerk will copy assignments of error appearing upon pages 9, 10 and 11 thereof.

17. Order of Supreme Court granting petitions for writs of certiorari filed by complainant and by defendant, entered February 27, 1937.

18. Opinion of Supreme Court.

19. Decree of Supreme Court, modifying the decree of the Court of Appeals, and affirming such decree as modified.

20. This præcipe.

The Clerk of the above entitled Court is requested to include in the transcript of the record only the papers designated herein. Said transcript to be prepared as required by law and the rules of this Court and the Supreme Court of the United States, and to be filed in the office of the Clerk of the Supreme Court of the United States with petition of complainant for writ of certiorari to review the final decree of this Court.

Dated, Chattanooga, Tennessee, June 16, 1937.

Thompson & Ballard, Solicitors for Complainant.

Service of the above præcipe is hereby accepted and acknowledged, this June 17, 1937.

Cantrell, Meacham & Moon, Solicitors for Defendant.

[fol. 114] IN SUPREME COURT OF TENNESSEE

CLERK'S CERTIFICATE

Office of Clerk of the Supreme Court for the Eastern Division of the State of Tennessee

I, S. E. Cleage, Clerk of said Court, do hereby certify that the foregoing is a true and correct copy of the original bill, demurrer of defendant, order amending bill of record, Memo

of Chancellor, decree on demurrer, Answer and cross bill, Answer to cross bill, deposition of C. H. McCollum, with exhibits "A" to "G" inclusive, Deposition of Walter Iler, the order amending bill and pleadings, correcting name of complainant, enrolled February 24, 1936, Memo of Chancellor, Final decree of Chancellor, granting appeal enrolled March 24, 1936, opinion of Court of Appeals, decree of Court of Appeals, From the petition of C. C. McCollum, Trustee to the Supreme Court for certiorari, the assignments of error; from the petition of Hamilton National Bank to Supreme Court for certiorari, the assignments of error, Order of Supreme Court granting petitions for writs of certiorari filed by complainant and by defendant, entered February 27, 1937, opinion of Supreme Court, Decree of Supreme Court, modifying the decree of the Court of Appeals, and affirming such decree as modified, in the case of C. C. McCollum, Trustee vs. Hamilton National Bank, and is everything as called for by the præcipe as appears of record now on file in my office.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of the Court, at office in Knoxville, on this the 26th day of June, 1937.

S. E. Cleage, Clerk. (Seal of the Supreme Court, Knoxville, Tenn.)

(683)

[fol. 115] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 11, 1937

The petition herein for a writ of certiorari to the Supreme Court of the State of Tennessee is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Black took no part in the consideration and decision of this application.

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FILED
AUG 24 1937
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1937

No. 342

C. C. McCOLLUM, TRUSTEE IN BANKRUPTCY OF LOOKOUT PLANING MILLS,

Petitioner,

vs.

HAMILTON NATIONAL BANK OF CHATTANOOGA.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF TENNESSEE AND BRIEF IN SUPPORT THEREOF.

JOSEPH W. THOMPSON,
Counsel for Petitioner.

JOSEPH B. ROBERTS,
FRED B. FRAZIER,
FRED B. BALLARD,
Of Counsel.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1937

No. 342

C. C. McCOLLUM, TRUSTEE IN BANKRUPTCY OF LOOKOUT PLANING MILLS,

Petitioner,

vs.

HAMILTON NATIONAL BANK OF CHATTANOOGA.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF TENNESSEE.

To the Honorable Charles Evans Hughes, Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

Your petitioner respectfully shows:

I.

Summary Statement of the Matter Involved.

This is a suit in equity, in the nature of an action of debt, brought in the Chancery Court at Chattanooga, Tennessee, by petitioner herein, trustee in bankruptcy of the Lookout Planing Mills, against the Hamilton National Bank of Chat-

tanooga, in which petitioner seeks to recover the penalty provided by the National Banking Act, U. S. Revised Statutes, Sections 5197, 5198, 12 U. S. C. A., Sections 85, 86, for the charging and taking of usurious or illegal interest (R. 1, *et seq.*).

Respondent filed an answer and cross-bill, alleging the bankrupt was indebted to it in the sum of $25,493.70, and praying that it be allowed to set off the amount thereof against any recovery complainant might have against it (R. 10).

Petitioner answered the cross-bill, alleging that his right of action was conferred by U. S. Revised Statutes, Sections 5197, 5198; that the remedy conferred thereby was exclusive, and that any recovery he might obtain against respondent was not subject to the payment of any obligation of the bankrupt to it (R. 12).

The Chancellor (R. 59-61); the Court of Appeals (R. 64-74) and the Supreme Court (R. 79-84) concurred in finding that the defendant Hamilton National Bank had, within the two-year period prior to the filing of the bill, knowingly charged to and received from the Lookout Planing Mills interest in excess of six per cent to an amount aggregating $5,235.55; and those Courts entered decrees in favor of petitioner for double that sum, or $10,471.10 (Chancellor, R. 61, Court of Appeals, R. 84).

The Chancellor was of opinion (R. 60, 61) that *after judgment* petitioner's claim was subject to set off, and accordingly ordered that the decree awarded petitioner be applied as a set off against or credit upon the indebtedness of the bankrupt to the defendant (R. 61-64).

Petitioner and respondent appealed to the State Court of Appeals (R. 63, 64). That court was of opinion that it would be inequitable not to allow defendant's claim of set off. The Court of Appeals was further of opinion, however, that the right of solicitors for petitioner to a lien for their

fees attached to the judgment and related back to the beginning of the suit, and was thus prior to the equitable right of the defendant to set off, which, the court said "is a floating equity until action by a Court is invoked" (R. 64, 70-74). The Court of Appeals accordingly modified the decree of the Chancellor so as to provide for a lien upon the decree in favor of solicitors for petitioner, and as so modified affirmed the same (R. 74).

Petitions for certiorari were filed by petitioner and respondent, both of which were granted by the Supreme Court (R. 79). That Court was of opinion that the penalty for which suit was brought could only be recovered in an independent action of debt, as directed by the Federal statute, but was further of opinion:

> "*Having obtained a decree for the penalty,* there is no provision in the Banking or Bankruptcy Acts restricting or prohibiting the offsetting of the same with any just debt owing to it by the bankrupt, and, as previously stated, this is expressly authorized by our statute." (Italics ours.) (R. 79, 82.)

The Supreme Court held that such offset is permissible under Section 68 (a) of the Bankruptcy Act, and expressly authorized by Section 8769 of the Tennessee Code, and the petitioner "will be required to do equity by having his claim credited on the larger one owing to the defendant" by the bankrupt (R. 81, 82; R. 84, 85). It was further held by the State Supreme Court that solicitors for petitioner did not have a lien on the decree for counsel fees. The decree of the Court of Appeals was modified accordingly, and as so modified was affirmed by the Supreme Court (R. 79-84; R. 84).

Your petitioner presents to this Court and files herewith a duly certified transcript of the entire record in the case as the same appears in the Supreme Court of the State of Tennessee.

The principal questions involved on said appeal may be summarized as follows:

(1) Did petitioner, as trustee in bankruptcy of the Lookout Planing Mills, have the right to recover the penalty provided by U. S. Revised Statutes, Section 5198, 12 U. S. C. A., Section 86, in "a suit brought specially and exclusively for that purpose," without the presentation or consideration by the Court of any counterclaim of the respondent based upon the balance owing it by the bankrupt?

(2) The respondent bank held an unsecured claim against the estate of the bankrupt, duly proved, and the trustee of the bankrupt had a claim for the penalty aforesaid, upon which he was awarded a decree against respondent bank for $10,471.10. Were these such "mutual debts or mutual credits" as could be set off one against the other under Section 68 of the Bankruptcy Act (11 U. S. C. A., Section 108)?

(3) Did the Court have the right under Section 8767 of the Code of Tennessee or under general principles of equity jurisprudence to direct the application of the indebtedness of the bankrupt to respondent as a set off against the decree in favor of petitioner?

These questions were decided by said Supreme Court and materially affected the final determination of said cause.

II.

Reasons Relied Upon for Allowance of the Writ.

(1) *Conflict With Applicable Decisions of This Court.*

This Court has uniformly held, in suits brought by national banks against borrowers, that the penalties and forfeitures, and the mode and remedy of enforcing them as prescribed by the Federal statute, are exclusive, and that the remedies

provided by the common law or statutes of the States to prevent collection of usurious interest, or to recover back usurious interest paid, have no application to usurious transactions by national banks.

Other courts have held that these decisions apply where the debtor brings a suit "specially and exclusively for the purpose" of recovering the penalty in question, and that the national bank when so sued cannot apply the balance owing to it by the borrower as a set off against or payment of the judgment for the penalty.

It is believed that to deny the right of set off of usurious payments to the borrower when sued by a national bank, and to grant the bank such right when sued by the borrower, would constitute a violation of the Fourteenth Amendment to the Constitution of the United States.

A final determination by this Court of last resort of the question here presented is a matter of very general interest and importance.

(2) *Important Question of Bankruptcy Law.*

Petitioner is seeking recovery of an asset of the bankrupt estate, and whether respondent is entitled to apply the debt of the bankrupt to it as a payment of the decree in favor of petitioner for the penalty is a question which should be finally determined by this Court of last resort, in order that the Bankruptcy Act may be uniformly applied in all the States.

(3) *Important Question of General Law.*

It is of importance both to borrowers and to national banks that this Court reaffirm and apply to the facts of this case the doctrine that where a cause of action arises exclusively under the laws of the United States the right to recover cannot be influenced by local law or usage as to set off or counterclaim.

(4) *Error in Decree of State Court.*

Upon both reason and authority the decree of the State Supreme Court is erroneous, and if allowed to stand will amount to a practical discharge of the bank from its liability of the usury statute, and encourage practices of this character. There will be no punishment of the violator of the statute, and no recompense to the estate of the borrower.

Petitioner annexes hereto his brief in support of this petition, in which he cites and relies upon applicable decisions of this Court and of other courts, under which he verily believes he is entitled to the relief here sought.

WHEREFORE your petitioner respectfully prays that writ of certiorari be granted to review the decree of the Supreme Court of Tennessee, entered May 24, 1937, in the case of C. C. McCollum, Trustee, *v.* Hamilton National Bank of Chattanooga, and that said decree may be reversed by this Honorable Court in so far as it provides that the amount of the indebtedness of the bankrupt to defendant shall be applied as a set off against the decree in favor of petitioner; and that your petitioner may have such other and further relief in the premises as this Honorable Court may deem meet and just.

And your petitioner will ever pray.

C. C. MCCOLLUM (Correct: C. *H.* McCollum), Trustee in Bankruptcy of Lookout Planing Mills,

By J. W. THOMPSON,

Counsel for Petitioner.

JOSEPH B. ROBERTS,
FRED B. FRAZIER,
FRED B. BALLARD,

Of Counsel.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1937

No. 342

C. C. McCOLLUM, Trustee in Bankruptcy of Lookout Planing Mills,

Petitioner,

vs.

HAMILTON NATIONAL BANK OF CHATTANOOGA.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

I.

Opinions in the Courts Below.

The opinion of the Supreme Court of Tennessee (R. 79-84) was rendered May 24, 1937. It is not now reported.

The opinion of the Court of Appeals of Tennessee (R. 64-74) was rendered August 1, 1936, and the opinion of the Chancellor (R. 59-61) was rendered March 6, 1936.

II.

Jurisdiction.

The statutory provision which is believed to sustain the jurisdiction of this Court is Section 237 (b) of the Judicial Code as amended (28 U. S. C. A., Section 344-b), the pertinent portion of which provides:

> "It shall be competent for the Supreme Court, by certiorari, to require that there be certified to it for re-

view and determination, with the same power and authority and with like effect as if brought up by writ of error, any cause * * * where any title, right, privilege, or immunity is specially set up or claimed by either party under the Constitution, or any treaty or statute of * * * the United States."

III.

Statement of the Case.

A full statement of the case has been given in Section I of the foregoing petition (pp. 1-5), which is hereto attached and made a part of this brief.

IV.

Specification of Errors.

(1) The State Supreme Court erred in holding and decreeing that the decrees of the Chancellor and the Court of Appeals be affirmed, in so far as such decrees directed that the indebtedness of the bankrupt to respondent be applied as a set off against or payment of the decree awarded petitioner in the sum of $10,471.10 as a penalty for the charging and taking of usurious or illegal interest (R. 79-84, 84-85).

(2) The State Supreme Court erred in holding that respondent had the right, under Section 68 (a) of the bankruptcy act, to set off the indebtedness of the bankrupt to it against the recovery decreed petitioner in this cause (R. 81).

(3) The State Supreme Court erred in holding that the respondent had the right, under Section 8769 of the Code of Tennessee, and under general principles of equity jurisprudence, to set off the indebtedness of the bankrupt to it against the recovery decreed petitioner in this cause (R. 82).

V.

Summary of Argument.

(1) *Conflict with Applicable Decisions of This Court.*

It is settled by the decisions of this Court that the penalties and forfeitures provided by the Federal statute and the mode and remedy of enforcing them are exclusive of those provided by the State statutes on the subject.

Barnet v. *Muncie National Bank* (1879), 98 U. S. 555, 25 L. Ed. 212;

Haseltine v. *Central National Bank* (1901), 183 U. S. 132, 46 L. Ed. 118.

The several States have with practicable unanimity recognized and followed this rule. The cases are collected in 101 A. L. R. 752, 753.

The remedy of setting off the usurious interest paid against the principal of the obligation in an action thereon by the bank, allowed by the State statute as to usury or set off, or under general equitable principles, has no application to usurious interest paid to a national bank.

Barnet v. *Muncie National Bank* (1879), 98 U. S. 555, 25 L. Ed. 212;

Haseltine v. *National Bank,* 183 U. S. 132, 46 L. Ed. 118;

Planters National Bank v. *Wysong,* 177 N. C. 380, certiorari denied, 250 U. S. 665, 63 L. Ed. 1196.

Other courts have held that the rule works both ways, and that these decisions are applicable where the debtor brings a suit "specially and exclusively for the purpose" of recovering the penalty in question, and that the national bank charging and taking the usurious or illegal interest cannot

apply the balance owing on account of principal as a set off against or payment of the penalty.

Morehouse v. *McRae,* 30 Hun. 628 (reversed on ground of accord and satisfaction, 98 N. Y. 502);
Lebanan National Bank v. *Karmany,* 98 Pa. 65;
Meredith v. *National Bank,* 127 Tenn. 90.

To deny the debtor the right to set off the penalty when sued by the bank, and to allow set off to the bank when sued for the penalty, would be a denial of the equal protection of the laws, in violation of the Fourteenth Amendment to the Constitution of the United States.

Tinsley v. *Anderson,* 171 U. S. 101, 43 L. Ed. 91;
Scott v. *McNeal,* 154 U. S. 34, 38 L. Ed. 896.

The following decisions of this Court are believed to sustain jurisdiction of this Court upon petition for certiorari:

Talbot v. *Sioux City National Bank,* 185 U. S. 182, 46 L. Ed 862;
U. S. v. *Bank of New York,* 296 U. S. 463.

(2) *Right of Respondent to Set Off Under Section* 68 (a) *of Bankruptcy Act.*

As the suit is brought by petitioner as trustee in connection with the administration of a bankrupt estate, the right of respondent to a set off is governed by the Bankruptcy Act, and the decisions of this Court on the subject are controlling:

Whaley v. *King,* 141 Tenn. 1, 6, 206 S. W. 31.

Section 68 of the Bankruptcy Act provides that in case of "mutual debts or mutual credits" between the estate of the bankrupt and a creditor the account shall be stated, and one debt shall be set off one against the other, etc.

The action of petitioner in the instant case, while in form *ex contractu,* is founded in fact upon a tort:

Chaffee v. *United States,* 18 Wall. 516, 21 L. Ed. 908.

This Court holds that a claim of this character does not become a "debt" when reduced to judgment (*Chase* v. *Curtis* (1885), 113 U. S. 452, 28 L. Ed. 1038; *Wetmore* v. *Markoe,* 196 U. S. 68, 49 L. Ed. 390); that such claims and liabilities as are here presented are held in inconsistent relations, are not of the same quality, are not claimed one from the other in the same right and that set off in such case is not permissible under Section 68 (a) of the Bankruptcy Act.

Libbey v. *Hopkins,* 104 U. S. 303, 26 L. Ed. 769;
Daykin v. *Bailey,* 290 U. S. 143, 78 L. Ed. 229.

In the following cases this Court held that in an action by a national bank the borrower cannot apply the amount of usurious or illegal payments of interest as a credit upon or set off against the amount owing by him to the bank:

Barnet v. *Muncie National Bank* (1878), 98 U. S. 555, 25 L. Ed. 212;
Driesbach v. *Second National Bank* (1881), 104 U. S. 52, 26 L. Ed. 658;
Haseltine v. *Central National Bank* (1901), 183 U. S. 132, 46 L. Ed. 118.

To grant respondent the right of set off under the facts here presented would be subversive of Section 57 (g) of the bankruptcy act (11 U. S. C. A., Section 93-g), the intent of which is that fraudulent or illegal transferees shall surrender their transfers in full before their claim to a dividend shall be allowed. If the set off be allowed to defeat petitioner's recovery respondent will, to this extent, collect its claim in full, and the illegal transaction will thus be perpetuated.

Page v. *Rogers,* 211 U. S. 575, 53 L. Ed. 332;
Lytle v. *Andrews* (8 C. C. A., 1929), 34 F. (2d) 352.

The three State courts concur in holding that the right of set off did not exist until decree was rendered in favor of petitioner; and under every applicable decision of this Court there can be no right of set off unless the same existed at the time of the adjudication in bankruptcy: *Daykin* v. *Bailey,* 290 U. S. 143, 78 L. Ed. 229, and the cases therein cited.

The right to set off is controlled by the Bankruptcy Act, the provisions of which are paramount to any common or statutory law of the several States. *Stellwagen* v. *Clum,* 245 U. S. 605, 62 L. Ed. 507. A Federal question is presented and the decision of the Supreme Court of Tennessee is therefore reviewable by this Court upon petition for certiorari:

Williams v. *Heard,* 140 U. S. 529, 35 L. Ed. 550;
Rector v. *City Dep. Bank,* 200 U. S. 405, 50 L. Ed. 527.

(3) *Right of Respondent to Set Off under State Statute, or under General Principles of Equity Jurisprudence.*

The State Supreme Court was of opinion (R. 82) that set off in such cases as the present is expressly authorized by Section 8769 of the Code of Tennessee (1932), with respect to "Set off of *mutual debts* of a different nature," and also under general principles of equity jurisprudence. This holding is contrary to repeated decisions of this Court to the effect that where a cause of action arises exclusively under the laws of the United States the right to recover cannot be influenced by local law or usage as to set off or counterclaim:

United States v. *Robeson,* 34 U. S. 319, 9 L. Ed. 142;
Barnet v. *Muncie National Bank,* 98 U. S. 555, 25 L. Ed. 212;
Haseltine v. *Central National Bank,* 183 U. S. 132, 45 L. Ed. 118.

To award petitioner a decree for the penalty prescribed by the Federal statute, and in the same action allow respondent a set off under a State statute is to administer the rights of the parties upon distinct and wholly inconsistent theories. This is not permissible.

There was here an unconstitutional exercise of authority under a valid State statute, and the question is one, therefore, for review by this Court upon petition for certiorari:

Zucht v. *King,* 260 U. S. 174, 177, 67 L. Ed. 194, 198.

Petitioner seeks to enforce a thoroughly established legal right, and the maxim *equitas sequitur legem* applies.

Hedges v. *Dixon County,* 150 U. S. 182, 37 L. Ed. 1044.

The Federal right set up in the State court was denied in substance and effect by interposing a non-Federal ground of decision having no fair support. There is thus presented a question upon which petitioner is entitled to invoke the judgment of this Court:

Ancient Egyptian, etc., Order v. *Michaux,* 279 U. S. 737, 73 L. Ed. 931;

Norris v. *State of Alabama,* 294 U. S. 587, 79 L. Ed. 1974.

VI.

ARGUMENT.

(1) Conflict with Applicable Decisions of This Court.

This is an action by petitioner as trustee in bankruptcy to recover the penalty prescribed by the National Banking Act, Sections 5197, 5198, U. S. Revised Statutes (12 U. S. C. A., Sections 85, 86).

The applicable portion of Section 5197, U. S. Revised Statutes (12 U. S. C. A., Section 85), reads as follows:

> "Any association may take, receive, reserve, and charge on any loan or discount made, or upon any

notes, bills of exchange, or other evidences of debt, interest at the rate allowed by the laws of the State, Territory, or District where the bank is located, or at a rate of 1 per centum in excess of the discount rate on ninety-day commercial paper in effect at the Federal reserve bank in the Federal reserve district where the bank is located, whichever may be the greater, *and no more,*" etc.

The penalty prescribed for a violation of the foregoing section is set forth in Section 5198, U. S. Revised Statutes (12 U. S. C. A., Section 86), which reads as follows:

> "The taking, receiving, reserving, or charging a rate of interest greater than is allowed by the preceding section, when knowingly done, shall be deemed a forfeiture of the entire interest which the note, bill, or other evidence of debt carries with it, or which has been agreed to be paid thereon. In case the greater rate of interest has been paid, the person by whom it has been paid, or his legal representatives, may recover back, in an action in the nature of an action of debt, twice the amount of the interest thus paid from the association taking or receiving the same: *Provided,* that such action is commenced within two years from the time the usurious transaction occurred."

This Court has uniformly held that the remedy prescribed by the statute for the recovery from a national bank for usurious interest actually paid is exclusive of all others. Thus, in *Barnet* v. *Muncie National Bank* (1878), 98 U. S. 555, 25 L. Ed. 212, the Court held that as the illegal interest had been *paid,* it could not be applied by way of set off or payment in an action on the obligation. After pointing out that the statutes of the States of Ohio and Indiana could not affect the case, and in holding that the specific remedy provided by the statute alone applied, it was said:

> "The remedy given by the statute for the wrong is a penal suit. To that the party aggrieved or his legal

representative must resort. He can have redress in no other mode or form of procedure. The statute which gives the right prescribed the redress, and both provisions are alike obligatory upon the parties.

"While the plaintiff in such cases, upon making out the facts, has a clear right to recover, the defendant has a right to insist that the prosecution shall be by a suit brought specially and exclusively for that purpose, where the sole issue is the guilt or innocence of the accused, without the presence of any extraneous facts which might confuse the case and mislead the jury to the prejudice of either party."

This case is cited and the rule applied in the following later cases:

Driesbach v. *Second National Bank* (1881), 104 U. S. 52, 26 L. Ed. 658;

Haseltine v. *Central National Bank* (1901), 183 U. S. 132, 45 L. Ed. 118.

The rule laid down in *Barnet* v. *National Bank, supra,* has never been departed from.

While this Court has never passed upon the precise question here presented, other courts have held, in cases where the right of set off was claimed by the bank against the borrower, that the principle announced by this Court in the foregoing cases applies with full force, and that the right of set off, denied to the borrower as aforesaid, cannot be extended to the violator of the statute when sued by the party for whose protection it was enacted. Thus, in *Morehouse* v. *McRae,* 30 Hun. 628 (reversed on the ground of accord and satisfaction, 98 N. Y., 552), in passing upon the question of whether the bank could avail itself of the balance due from the borrower as a set off against the claim for the statutory penalty, the Court said (page 630):

"In the case of *National Bank of Auburn* v. *Lewis* (*supra*) it was held, following *Barnet* v. *National Bank*

(98 U. S., 555), that a cause of action for the penalties in question could not be offset in an action for the amount due on the notes; and it would seem, on principle, that the rule must work both ways. Indeed, the reasoning of the two decisions last cited is applicable to the one case as to the other. The action given by the statute is in the strictest sense a penal action. The penalty is incurred the moment the illegal interest is exacted and received; and in the case of *Barnet v. Bank*, the Court said that the penalty can be recovered only in an action 'where the sole issue is the guilt or innocence of the accused, without the presence of any extraneous facts which might confuse the case,' etc. This is directly to the effect that in an action for the penalty no other question can be litigated than the question whether the illegal interest was received; and such, I suppose, is the rule in all penal actions."

The same rule was followed in *Lebanan National Bank* v. *Karmany*, 98 Pa. 65.

In *Meredith* v. *National Bank*, 127 Tenn. 90, the Supreme Court of Tennessee declined to permit the application of payments made, whether intended as interest payments or not, to that portion of the obligation of the borrower which remained unpaid. The Court says, page 93, that such a result has been reached by some courts in construing usury statutes of the different States—

> "but the act of congress with reference to national banks is strictly a penalty statute and no Court has held that payment of the debtor's obligation in full is a condition precedent to the bringing of a suit for recovery thereunder."

The Court accordingly reversed the decree of the Chancellor sustaining the demurrer and dismissing the bill.

The borrower, for whose benefit the act was passed, is not allowed, in an action by the bank, to apply the illegal or usurious payments as a credit upon the balance owing by

him. It would seem therefore a discrimination against the borrower and a denial of the equal protection of the laws to grant this same right to the bank when the borrower brings a suit "specially and exclusively for the purpose" of recovering the penalty. It is believed that the decree of the State Supreme Court accomplishing this result constitutes a violation of the Fourteenth Amendment to the Constitution of the United States, under the rule laid down by this Court in *Tinsley* v. *Anderson,* 171 U. S. 101, 43 L. Ed. 91, and *Scott* v. *McNeal,* 154 U. S. 34, 38 L. Ed. 896.

Petitioner brings this suit under the provisions of the National Banking Act (12 U. S. C. A., 85, 86), and in substance and effect the decision of the Supreme Court of Tennessee was adverse to the right and the remedy prescribed by such statute. It is believed that this Court therefore has jurisdiction of the case, under the express terms of Section 237 (b) of the Judicial Code as amended (28 U. S. C. A., Section 344 (b).

Talbot v. *Sioux City National Bank,* 185 U. S. 182, 46 L. Ed. 862;

U. S. v. *Bank of New York,* 296 U. S. 463.

(2) Right of Respondent to Set Off Under Section 68 (a) of Bankruptcy Act.

If the matter of set off is entitled to any consideration whatever in a suit to recover the penalty provided by the National Banking Act, in the present instance this right must be controlled by the express provisions of Section 68 (a) of the Bankruptcy Act.

Stellwagen v. *Clum,* 245 U. S. 605, 62 L. Ed. 507;

Whaley v. *King,* 141 Tenn. 1-6, 206 S. W. 31.

Section 1 (11), of the Bankruptcy Act (11 U. S. C. A., Section 1 (11)), provides that the word "debt" shall include any debt, demand or claim provable in bankruptcy.

Section 68 of the act (11 U. S. C. A., Section 108) provides:

> "(a) In all cases of mutual debts or mutual credits between the estate of a bankrupt and a creditor the account shall be stated and one debt shall be set off against the other, and the balance only shall be allowed or paid."

Also that:

> "(b) A set off or counterclaim shall not be allowed in favor of any debtor of the bankrupt which is not provable against the estate."

While the form of the present action is *ex contractu* it is in fact a *tort* action, as directly held by this Court in *Chaffee* v. *U. S.*, 18 Wall. 516, 21 L. Ed. 908; and the fact that a decree had been rendered does not change the nature of the liability of respondent, or the relation between the parties. The claim for the penalty does not become a "debt" after the rendition of judgment.

Chase v. *Curtis* (1885), 113 U. S. 452, 28 L. Ed. 1038;
Wetmore v. *Markoe*, 196 U. S. 68, 49 L. Ed. 390.

Prior to the filing of the petition in bankruptcy the Hamilton National Bank was a creditor of the Lookout Planing Mills and the latter was its debtor because of borrowed money. The bank owed the Lookout Planing Mills nothing. There was no mutuality of debts and credits between the Lookout Planing Mills and the bank when the petition was filed, which is the time when the right of set off must be measured. *Daykin* v. *Bailey*, 290 U. S. 143, 78 L. Ed. 229, and cases there cited. At that time by virtue of law there came to the trustee in bankruptcy, the petitioner here, the right to recover the penalty sued for. This right was exercised and bore fruit. It was translated from a right to recover for the benefit of creditors into actual ownership of

the decree against the bank. The obligation of the bank to pay the penalty, before and after judgment, became the trustee's property. There was never any mutuality of debts and credits between the bank and the Lookout Planing Mills, or the bank and the trustee. It is the same as if the trustee after his appointment had deposited funds of the estate with the bank. There would then have been no right of set off; mutuality of debt and credit at the time of the filing of the petition, or at any other time, would have been lacking.

McDaniel National Bank v. *Bridwell* (8 C. C. A., Nov., 1934), 74 F. (2d) 331.

Aside from other considerations, this Court has jurisdiction of the case upon petition for certiorari because of the misconstruction and misapplication of the Bankruptcy Act to the facts here presented.

Williams v. *Heard,* 140 U. S. 529, 35 L. Ed. 550;
Rector v. *City Dep. Bank,* 200 U. S. 405, 50 L. Ed. 527.

(3) Right of Respondent to Set Off Under State Statute and General Principles of Equity Jurisprudence.

The caption of the State statute (Tenn. Code 1932, Section 8769) reads:

"Set-off of *mutual debts* of a different nature."

The act itself provides:

> "*Mutual debts* * * * between the parties to a suit * * * may be set off against each other. * * * And if either *debt* arose by reason of a penalty, the sum intended to be set off shall be pleaded in bar," etc. (Italics ours.)

The State statute thus, by its very terms, applies only to a set off of *mutual debts,* and not to other causes of action. There is no mutuality of debt between petitioner

and respondent, as petitioner does not owe the bank anything. There has never existed the relation of mutual debtor and creditor.

The provision of the Federal statute for the "recovery back, in an action in the nature of an action of debt, twice the amount of interest thus paid" would be nugatory if the State Supreme Court could be allowed to enter a decree in favor of petitioner under the Act of Congress, and then direct that this decree be applied as a set off against or payment upon the amount owing to the bank by the bankrupt. To permit such practice would lead to a varying measure of responsibility in the several States in which the question of liability might arise, depending upon the conceptions of the State Courts of last resort as to the meaning of the Act of Congress, and some counter right under some common or statute law of the State. The error in the decision below becomes at once apparent when its correctness is tested by the rule that the statute is applicable and furnishes the exclusive test of liability of respondent, and the corresponding right of petitioner.

Yates v. *Jones National Bank*, 206 U. S. 179, 51 L. Ed. 1002, 1014.

In *Barnet* v. *Muncie National Bank* (1879), 98 U. S. 533, 25 L. Ed. 212, suit was brought by the bank upon a bill of exchange, and the payment of usurious interest was set up as an offset or defense. This Court said:

> "The statutes of Ohio and Indiana upon the subject of usury may be laid out of view. They cannot affect the case."

In *Haseltine* v. *Central National Bank* (1901), 183 U. S. 132, 46 L. Ed. 118, this Court holds that usurious interest paid in cash cannot be set off in an action upon the note, and that the remedy provided by U. S. Revised Statutes,

Section 5198, for the recovery of twice the amount thereof in an action in the nature of an action of debt is exclusive.

In *Schuyler National Bank* v. *Gadsden*, 191 U. S. 451, 48 L. Ed. 258, Mr. Justice White delivering the opinion of the Court, the question for decision was, Did the Supreme Court of Nebraska rightly decide that the controversy concerning usurious interest paid was to be governed by the statutes of Nebraska on that subject and not by the laws of the United States on the same subject, as expressed in Section 5198 of the Revised Statutes? In holding that if the rights of the parties were to be determined by the laws of the United States the ruling below was erroneous, the Court said:

> "This results from the prior adjudications of this Court, holding that where usurious interest has been paid to a national bank, the remedy afforded by 5198 of the Revised Statutes (U. S. Comp. Stat. 1901, p. 3493), is exclusive, and is confined to an independent action to recover such usurious payments. *Haseltine* v. *Central Nat. Bank*, 183 U. S. 132, 46 L. Ed. 118, 22 Sup. Ct. Rep. 50, and cases cited."

The Court concluded that the reasoning by which the judgment of the Supreme Court of Nebraska was controlled was erroneous in so far as it held that the remedy as to usurious interest was governed exclusively by the State law. On this point the Court said:

> "As the usurious interest for which a remedy was afforded has been paid to the bank in dealings by the bank with its debtor, and as the necessary effect of the judgment below was to reduce the debt due to the bank by allowing the imputation of the sum of the usurious interest, we are of opinion that the controversy was governed by the laws of the United States, and not by the law of the State of Nebraska."

The Court also pointed out that the fact that the bank had accepted real estate security for the payment of the

indebtedness, in violation of the provisions of the Banking Act, did not operate in any way to modify the conclusions above expressed, and the Court accordingly held that the Supreme Court of Nebraska had erroneously determined the rights of the parties by the rule of the State law when it should have applied the law of the United States.

In *Farmers' & M. National Bank* v. *Dearing,* 91 U. S. 29, 23 L. Ed. 196, it was held that the law of New York forfeiting the entire debt for usury was superseded by the national banking law, and that the Federal statute only was to be regarded in determining the penalty for the usury.

The State court said petitioner had invoked the jurisdiction of a court of equity and that for this reason he would "be required to do equity by having his claim credited on the larger one owing to the defendant" (Opinion, R. 82). The State Supreme Court overlooked the rule that courts of equity are bound by positive provisions of a statute equally with courts of law, and they have no right to deny a well-established legal right upon considerations of general equitable principles. This Court states the applicable rule in *Hedges* v. *Dixon County,* 150 U. S. 182, 37 L. Ed. 1044, to-wit:

> "The established rule, although not of universal application, is that equity follows the law, or, as stated in *Magniac* v. *Thomson,* 56 U. S., 15 How. 299 (14: 703), 'that wherever the rights or the situation of parties are clearly defined and established by law, equity has no power to change or unsettle those rights or that situation, but in all such instances the maxim *equitas sequitur legem* is strictly applicable.' "

It was further said in this case:

> "Courts of equity can no more disregard statutory and constitutional requirements and provisions than Courts of law. They are bound by positive provisions of a statute equally with courts of law."

Petitioner does not claim that the State statute with respect to set off is unconstitutional, or that principles of general equitable jurisprudence may not be considered in proper cases. In the instant case it is believed there is an unconstitutional grant of the right of set off to respondent under a valid statute and under equitable considerations which have no proper application, and for this reason there is presented a question for review and correction by this Court upon petition for certiorari.

Zucht v. *King*, 260 U. S. 174-179, 67 L. Ed. 194, 199.

Conclusion.

It is, therefore, respectfully submitted that this case is one calling for the issuance of a writ of certiorari and the exercise by this Court of its supervisory powers, in order that the decree of the Supreme Court of the State of Tennessee, entered May 24, 1937, modifying and affirming the decree of the Court of Appeals of the State in the case styled on its docket *C. C. McCollum, trustee,* v. *Hamilton National Bank of Chattanooga,* may be modified and reversed by this Honorable Court, in so far as it provides that the amount of the indebtedness of the bankrupt to respondent shall be applied as a set off against or payment of the decree in favor of petitioner.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1937.

No. 342.

C. C. McCOLLUM, Trustee in Bankruptcy of
LOOKOUT PLANING MILLS,
Petitioner,

versus

HAMILTON NATIONAL BANK OF CHATTANOOGA.

SUPPLEMENTAL BRIEF ON BEHALF OF PETITIONER.

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SUPREME COURT OF THE UNITED STATES.

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C. C. McCOLLUM, Trustee in Bankruptcy of
LOOKOUT PLANING MILLS,
Petitioner,

versus

HAMILTON NATIONAL BANK OF CHATTANOOGA.

SUPPLEMENTAL BRIEF ON BEHALF OF PETITIONER.

The petition for writ of certiorari having been granted, the question now presented is whether the Supreme Court of Tennessee erred in decreeing that the defendant bank was entitled to set off against petitioner's judgment any debt owing it by the bankrupt (R. 82).

Petitioner contends (1) that he has been denied the right to have his action to recover the penalty governed exclusively by the specific provisions of Section 5198, U. S. Revised Statutes, 12 U. S. C. A., Section 86, and (2) if the de-

fense of set-off be available, this right is governed *ex proprio vigore* by Section 68 of the Bankruptcy Act, under which no set-off would be permissible.

We present these contentions in the order stated.

(1) Petitioner Denied the Right to the Exclusive Remedy Provided by the Federal Statute.

The Supreme Court of Tennessee held that petitioner's right and remedy were governed by the National Banking Act, Section 5198, U. S. Revised Statutes, 12 U. S. C. A., Section 86, and that the penalty could only be recovered in an independent action of debt. However, the state court was further of opinion that "there is no provision in the Banking or Bankruptcy Act restricting or prohibiting the bank from off-setting the same (the decree for the penalty) with any just debt owing to it by the bankrupt, and, as previously stated, this is expressly authorized by our statute" (R. 82).

The decree of the State Supreme Court, directing that the judgment for the penalty be applied as a set-off against the indebtedness of the bankrupt to the defendant, is based upon an incorrect conception of the federal legislation creating and regulating national banks. This legislation has in view the erection of a system extending throughout the country, and independent, so far as powers conferred and penalties provided are concerned, of state legislation, which, if permitted to be applicable, might impose limitations and restrictions as various and numerous as the states (**Easton v. Iowa**, 188 U. S. 220, 47 L. Ed. 452, 456).

It was said in **Farmers & Mechanics National Bank v. Dearing**, 91 U. S. 29, 23 L. Ed. 196:

"National banks organized under the act are in-

struments designed to be used to aid the Government in the administration of an important branch of public service. They are means appropriate to that end."

It is not necessary, we believe, to quote at length the provisions of the National Banking Act, but it is sufficient to say that banks organized thereunder are authorized to make contracts and to exercise all such incidental powers as may be necessary to carry on the business of banking, including the discounting and negotiating of promissory notes and drafts. Severe penalties are imposed upon any officer or agent of such association who violates any of the provisions of the National Bank Act, and section 5198 (12 U. S. C. A., Section 86) provides that if more than the legal rate of interest is charged by and paid to any association organized under the act, the person by whom it has been paid, or his legal representative, "may recover back, in an action in the nature of an action of debt, twice the amount of interest thus paid," etc.

Congress has thus provided a symmetrical and complete scheme for the banks to be organized under the provisions of the statute, and has given particular attention to the matter of interest or discounts which may be charged and taken by them, and has provided a special and severe penalty for the violation of the provisions of the act with respect to usury. It cannot be said that Congress intended to leave the field open for the states to attempt to promote the welfare and stability of national banks by direct legislation, or to retard, impede, burden or in any manner control the enforcement of the penalty provided for the taking of usury. If they had such power it would have to be exercised and limited by their own discretion, and confusion would necessarily result from control possessed and exercised by two independent authorities (**Easton v. Iowa**, supra).

Only by disturbing the uniformity which the act is designed to secure and departing from the principle which it is intended to enforce can any state require, as a condition precedent to relief, that the debtor either show that the principal debt has been fully satisfied, or that the decree for the penalty shall be applied as a set-off thereon. No state is at liberty thus to interfere with the operation of a law of Congress (**New York Central R. Co. v. Winfield**, 244 U. S. 147, 61 L. Ed. 1045).

A leading case in which this Court had occasion to consider the limitation of legislation by a state affecting a subject within the scope of action by Congress is that of **Prigg v. Pennsylvania**, 16 Pet. 539, 10 L. Ed. 1060, from which we quote the following observations:

> "If Congress had a constitutional power to regulate a particular subject, and they do actually regulate it in a given manner and in a certain form, it cannot be that the state legislatures have a right to interfere, and, as it were, by way of complement to the legislation of Congress, to prescribe additional regulations, and what they may deem auxiliary provisions for the same purpose. In such a case, the legislation of Congress, in what it does prescribe, manifestly indicates that it does not intend that there shall be any further legislation to act upon the subject matter. Its silence as to what it does not do is as expressive of what its intention is as the direct provisions made by it."

On the immediate subject of control over national banks it was said, in **Farmers & Mechanics Nat'l Bank v. Dearing**, 91 U. S. 29, 23 L. Ed. 196:

> "The states can exercise no control over them (national banks), nor in anywise affect their operation, ex-

> cept in so far as Congress may see proper to permit. Anything beyond this is 'an abuse, because it is the usurpation of power which a single state cannot give.' • • • 'The states have no power, by taxation or otherwise, to • • • burden, or in any manner control, the operation of constitutional laws enacted by Congress to carry into execution the powers vested in the general government.'"

With respect to the 30th section of the Act of 1864, carried into Section 5198 of the Revised Statutes, it was said:

> "In any view that can be taken of the 30th section the power to supplement it by State legislation is conferred neither expressly nor by implication."

In **Yates v. Jones National Bank**, 206 U. S. 179, 51 L. Ed. 1002, opinion by Mr. Justice White, the Court considered the liability of directors of a national bank for the making of false representations as to the bank's financial condition contained in the official report to the Comptroller of the Currency, and held that such liability is exclusively governed by the specific provisions on the subject contained in the National Bank Act, and that a contrary conclusion would lead to a varying measure of responsibility to the several states in which the question of liability might arise, depending upon the conception of the state courts of last resort as to the meaning of the Acts of Congress imposing the duties; that the same provision of the statute might mean one thing in one state and a different thing in another. The Court said:

> "The civil liability of national bank directors, then, in respect to the making and publishing of the official reports of the condition of the bank, a duty solely en-

joined by the statute, being governed by the national bank act, it is self-evident that the rule expressed by the statute is exclusive, because of the elementary principles that where a statute creates a duty and prescribes a penalty for nonperformance, the rule prescribed in the statute is the exclusive test of liability. **Farmers & Mechanics Nat'l Bank v. Dearing**, 91 U. S. 29, 35, 23 L. Ed. 198, 199, and cases cited. The error in the decision below becomes at once apparent when its correctness is tested by the rule that the statute is applicable and prescribes the exclusive test of liability."

In the case of **Gilvary v. Cuyahoga Valley R. Company** (1934), 292 U. S. 57, 78 L. Ed. 1123, 54 Sup. Ct. Rep. 573, the Court said, with respect to the Safety Appliance Acts:

> "These acts operate to exclude State legislation, whether consistent, complementary, additional, or otherwise."

This Court has held, with special reference to Section 5198, Revised Statutes:

> "Where the statute creates a new offense and denounces the penalty or gives a new right and declares the penalty the punishment or the remedy can be only that which the statute prescribes."
>
> Farmers & Mechanics Nat'l Bank v. Dearing (1875), 91 U. S. 20, 23 L. Ed. 196.

> "The statutes of Ohio and Indiana upon the subject of usury may be laid out of view. They cannot affect the case. * * *
>
> "The remedy given by the statute for a wrong is a penal suit. To that the party aggrieved or his legal representative must resort. He can have redress in no other mode or form of procedure. The statute

which gives the right prescribes the redress, and both provisions are alike obligatory upon the parties.

"* * * The defendant has a right to insist that the prosecution shall be by a suit **brought specially and exclusively for that purpose**, where the sole issue is the guilt or innocence of the accused, without the presence of **any** extraneous facts which might confuse the case," etc. (Emphasis ours.)

Barnet v. Muncie Nat'l Bank (1878), 98 U. S. 555, 25 L. Ed. 212.

"The Supreme Court of Missouri was correct in holding that the defendants could not be allowed set-off or credit for the usurious interest thus paid, **the remedy provided by the statute being exclusive.**" (Emphasis ours.)

Haseltine v. Central Nat'l Bank (1901), 183 U. S. 132, 46 L. Ed. 118.

"The remedy afforded by Section 5198 of the Revised Statutes is exclusive and **is confined to an independent action** to recover the usury payments." (Emphasis ours.)

Schuyler National Bank v. Gadsden (1903), 191 U. S. 451, 58 L. Ed. 258, 24 Sup. Ct. Rep. 129.

That usurious interest paid to a national bank cannot be applied by way of set-off or payment on the principal is directly held by this Court in **Barnet v. Muncie Nat'l Bank** (1878), 98 U. S. 555, 25 L. Ed. 212, and other cases cited and quoted from on page 14 et seq. of our original brief. These cases consider the question in the reverse situation from that here presented, that is to say, the right of set-off is not here claimed in behalf of the estate, but against it. But that is not material. The principle is the same (**In re Becker Bros.**, 139 Fed. 366), and was applied by the Supreme Court of Tennessee in **Meredith v. National Bank,**

127 Tenn. 90, which was a suit brought to recover the penalty in question, and the Court held that the penalty could not be applied as a credit on the principal. This rule was cited by petitioner, but not referred to by the state court in deciding the case.

In **First National Bank v. Hunter**, 109 Tenn. 91, 70 S. W. 371, the State Supreme Court held, following **Haseltine v. Bank**, 183 U. S. 135, and other similar cases, that in an action by a national bank upon notes held by it a defendant cannot set off or recover by cross bill the amount of usury actually paid, even though the notes represent the unpaid remnants of a series of renewals upon which usury was paid. Undoubtedly the Court was correct in following the decisions of this Court, notwithstanding there was then in full force and effect the same state statute with respect to set-off under which the state court now holds that such relief is available.

In **Lebanon National Bank v. Karmany**, 98 Pa. 65, the defendant offered in evidence certain judgments recovered by it against the plaintiff, exceeding in amount the penalty claimed in the action. In holding that set-off is not permissible in an action for the penalty prescribed by the federal statute, the Court said (page 75):

> "The terms of the statute are too plain for different constructions. If illegal interest be contracted for, the debt shall bear no interest. If such interest be paid, the offending bank is liable in an action for twice the amount. That liability is incurred the moment the bank takes the illegal interest. The intendment is to prevent banks contracting or receiving more than lawful interest for the use of money. To permit a bank which had actually received illegal interest, when sued for the penalty, to chop round and call it a credit on the principal, would vitiate the vindicatory clause of

the statute. In such case the taking would amount to nothing more than a contracting to receive. The statute inflicts twice the penalty for taking that it does for contracting. **Monongahela Nat'l Bank v. Overhold,** 38 Leg. Intell. 185. In Pennsylvania the statute authorizes the debtor, at his option, to deduct the excess of interest from the debt, or to pay the whole debt and unlawful interest, and then recover back the excess over the lawful. **Such statutes and decisions under them throw no light on the question now pending."** (Emphasis ours.)

That the payment of the principal debt is not a condition precedent to a recovery of the penalty, and that it cannot be applied as a credit upon any balance owing the bank is further apparent from the case of **McCarthy v. First National Bank** (1912), 223 U. S. 493, 56 L. Ed. 523, where Mr. Justice Lamar pointed out that the statute not only furnishes a defense where illegal interest is charged, but gives a right of action where illegal interest is actually paid, which right of action arises immediately upon the interest being paid, without respect to the date of the loan, or the date of the satisfaction of the debt. The Court said:

"But when the debtor actually makes a payment, as interest, and the bank knowingly receives and appropriates it as such, the usurious transaction is complete, **the right of the one and the liability of the other is fixed, the cause of action arises, and the Statute of Limitations begins to run.** There is no *locus penitentiae.* That privilege is only granted to those banks which, having charged usury, may, by a refusal to accept interest when tendered, show that they will not carry the illegal contract into execution, and thus escape the twofold penalty." (Emphasis ours.)

The right of the debtor to the penalty and the liability of the bank therefor being fixed at the date of the payment

of the usury, it must follow, we believe, that the defendant in the instant case, having violated the statute, cannot have all the advantage of a *locus penitentiae* by a decree that the fine or penalty provided for its illegal act shall be applied as a credit upon the debt of the bankrupt to it.

Finally, on this phase of the case, this is a **penal** or **tort** action, to recover the penalty provided for a wrong done the estate of the bankrupt.

> "A suit against a national bank to recover back twice the amount of interest illegally paid **is a suit to recover a penalty** under a law of the United States." (Emphasis ours.)
>
> Chicago Nat'l Bank v. Morgan, 132 U. S. 141, 33 L. Ed. 282.

The statute, strictly and primarily, is designed to impose **punishment** for an offense against the people of the United States. **Huntington v. Attrill**, 146 U. S. 657, 36 L. Ed. 1123.

In the present case the bank has confessedly charged and collected illegal interest. It has violated the law and is liable for the penalty. If it be held that a bank, when sued for the penalty, may plead as a justification that a debt was due it by the bankrupt in bar of the action, the violator of the statute would escape merited punishment, and would feel free to take illegal interest at will, in defiance of law.

Lebanon Nat'l Bank v. Karmany, 98 Pa. 65.

The rule established by this Court, that in an action for the penalty no other question can be litigated except the

question of whether the illegal interest was received, is the rule in all penal actions.

> Morehouse v. McRae, 30 Hun. 628 (reversed on ground of accord and satisfaction, 98 N. Y. 552).

The equitable defense of set-off is not available in the instant case, because it has no place in the procedural conditions contained in the statute itself.

> Lowden v. Northwestern Nat'l Bank & Tr. Company, 298 U. S. 164, 80 L. Ed. 114.

(2) Controversy as to Set-Off Controlled by the Bankruptcy Act.

It is believed defendant's claim to right of set-off is concluded by what has been said hereinabove, and particularly the fact that the doctrine of set-off has no place in the procedural conditions provided by the statute (**Lowden v. Northwestern N. Bank**, 298 U. S. 164, 80 L. Ed. 114, 56 S. Ct. 696). However, if the Court should come to a consideration of the question whether defendant is entitled to the defense of set-off, petitioner contends that he sues as trustee in bankruptcy, and for this reason the controversy is controlled, *ex proprio vigore,* by Section 68 (a) of the Bankruptcy Act, 11 U. S. C. A., Section 108-a), which provides:

> "In all cases of **mutual debts or mutual credits** between the estate of a bankrupt and a creditor the account shall be stated and one debt shall be set off against the other, and the balance only shall be allowed or paid." (Emphasis ours.)

In the words of Mr. Justice Cardozo, this precept was

"framed on the example of ancient laws from across the seas," and "is applicable by force of statute to the liquidation of estates in bankruptcy." The rule in bankruptcy is "framed in adaption to standarized conditions, and the more flexible rule enforced in such cases by courts of equity is not to be substituted therefor. **Lowden v. Northwestern N. Bank**, 298 U. S. 164, 80 L. Ed. 114, 56 S. Ct. 696.

From the wording of the foregoing subsection of the statute it is evident that before a creditor may enjoy the use of the set-off principle against the bankrupt's estate, two essential elements must be established:

(a) Two debts must exist, one of the creditor and one of the bankrupt's estate.

(b) These debts must be mutual, i. e., the creditor's debt must be owing to the estate of the bankrupt, and the estate's debt must be owing to the creditor.

When these essentials are fulfilled the statute applies with full force and may be taken advantage of. If the two elements do not exist, there is no right of set-off.

McDaniel Nat. Bank v. Bridwell (8 C. C. A.), 74 F. (2d) 331.

Petitioner contends (a) there are not two debts in the instant case, the claim for the penalty not being a debt within the meaning of the statute, and (b) the debt of the bankrupt to the bank and the liability of the bank for the penalty are not due in the same capacity or right, and there is not mutuality as to the quality of the right.

(a) **Claim of petitioner for penalty not a debt.**

That the term "mutual debts and credits" does not include a claim for a penalty such as that here sought to be

enforced appears from Section 1 (11) of the Bankruptcy Act (11 U. S. C. A., Section 1), which provides that the word "debt" shall include any debt, demand or claim provable in bankruptcy.

Under Section 57 (j) of the Bankruptcy Act a claim for a penalty of this character is not provable against a bankrupt, and this Court has repeatedly held that statutory penalties and common-law liabilities of this kind, not predicated on contract, are nondischargeable and nonprovable in bankruptcy.

> Dunbar v. Dunbar, 190 U. S. 340, 47 L. Ed. 1084;
> Wetmore v. Markoe, 196 U. S. 68, 49 L. Ed. 390.

The Bankruptcy Act of 1867 had a provision substantially similar to section 68 (a) of the present act, which was itself taken from the earlier English acts, under which it was decided that "mutual credits" are meant such as must, in their nature, terminate in **debts**, or a debt be in the contemplation of the parties. **Libby v. Hopkins**, 104 U. S. 303, 26 L. Ed. 769. It was accordingly held in this case that in a suit by an assignee in bankruptcy to recover money sent to defendant by the bankrupt to be applied to a specific purpose constituted a trust and not a debt, and that the same could not be applied as a set-off upon a debt owing by the bankrupt to defendant. It was said:

> "In our act the terms 'credits' and 'debts' are used as correlative. What is a debt on one side is a credit on the other, so that the term 'credits' can have no broader meaning than the term 'debts.' We find no warrant in the language of the section or its context for extending the term 'credits' so as to include trusts. Generally, we know that 'credit' and 'trust' are not synonymous terms. They have distinct and well-settled meanings, and we see no reason why they

should be confounded in interpreting the twentieth section of the Bankrupt Act.

"To authorize a set-off there must be mutual credits or mutual debts."

It seems, likewise, that "debt" and "penalty" are not synonymous terms; they have distinct and well-settled meanings, and should not be confounded in interpreting Section 68 of our Bankruptcy Act.

The charging and taking of illegal interest did not make the bank the debtor of the bankrupt, but its tort-feasor, so there were in the case no mutual debts or credits. The indebtedness was all on the side of the Lookout Planing Mills. The bank owed it nothing. The liability for the penalty was not created for the purpose of being applied in satisfaction of the debt; neither of the parties had any such purpose at the time the debt was created. To hold that the penalty shall be so applied without the consent of the party entitled to recover the penalty would produce a result not contemplated by Congress or the parties, and would permit a national bank to violate the mandate of the statute almost at will.

Libby v. Hopkins, supra;
McDaniel Nat'l Bank v. Bridwell (8 C. C. A.), 74 F. (2d) 331.

The suit of petitioner is a **penal** action.

"The remedy given for the wrong is a **penal suit.**"
Barnet v. Muncie National Bank (1878), 98 U. S. 555, 25 L. Ed. 212.

It is "a suit to recover a penalty under a law of the United States."

Chicago N. Bank v. Morgan, 132 U. S. 141, 33 L. Ed. 282.

The right of action given by this statute is not a recovery of the money paid by the bankrupt, but it is an action to recover a penalty, and the fact that the amount of the penalty is fixed by the amount of the interest paid does not change the fact that the recovery is a penalty. **Sugg v. Smith** (Texas Court of Appeals), 205 S. W. 363, 373.

While the action is in *form ex contractu,* it is founded in fact upon a tort.

Chaffee v. United States, 18 Wall. 516, 21 L. Ed. 908.

"Ordinarily the term 'debt' does not include the obligation arising on account of a tort committed."

17 C. J., page 1378.

In **Wilson v. National Bank of Rolla** (C. C.), 3 Fed. 391, the Court said, construing the Statute of 1867, of a penalty imposed by a statute against usury, page 393:

"It is very clear that a penalty for violation of a penal statute is not a debt within the terms of the law, and that is all the claim there was in favor of the bankrupt at the time of the adjudication in bankruptcy."

Essential Nature of Cause of Action Not Changed by Rendition of Judgment.

Counsel for defendant bank say, on page 13 of their brief:

"The penalty was reduced to judgment in this suit * * * the judgment became, even if the right of action had not before been, * * * subject to set-off against the claim of defendant Bank."

This Court has refused to follow the rule contended for by defendant. On the contrary, it has repeatedly held that the essential nature and real foundation of a cause of action are not changed by recovering judgment upon it. Thus, in **Wisconsin v. Pelican Insurance Company**, 127 U. S. 265, 32 L. Ed. 239, it is said:

> "The essential nature and real foundation of a cause of action are not changed by recovering judgment upon it."

In **Boynton v. Ball**, 121 U. S. 457, 466, 31 L. Ed. 985, 986, it is said:

> "But this Court * * * is clearly of opinion that the debt on which this judgment was rendered is the same debt that it was before; that, notwithstanding the change in its form from that of a simple contract debt, or unliquidated claim, or whatever its character may have been * * * it still remains the same debt on which the action was brought," etc.

In **Wetmore v. Markoe**, 196 U. S. 68, 49 L. Ed. 390, opinion by Mr. Justice Day, in holding that a final decree for alimony was not a "debt" within the meaning of the Bankruptcy Act, and dischargeable as such, the Court said:

> "The mere fact that a judgment has been rendered does not prevent the Court from looking into the proceedings with a view of determining the nature of the liability which has been reduced to judgment."

It was further said in this **Wetmore v. Markoe** case that while the obligation had become fixed by an unalterable decree so far as the amount to be contributed by the husband was concerned, the Court would look beneath the

judgment for the foundation upon which it rested; that the judgment "was only a means designed by the Court for carrying into effect and making available to the wife and children a right which the law gives them as against the husband and father."

Looking beneath the judgment for the foundation upon which the judgment for petitioner rests, it is readily apparent, we believe, that it was not decreed for any debt of the bank to the bankrupt, but was only a means designed by the law for carrying into effect the intent of Congress to punish a violator of the usury statute, and to make available to the bankrupt and its creditors the right which the law gives them against such violator.

Counsel for defendant apparently concede that the claim or liability for the penalty was not subject to set-off against the debt of the bankrupt to defendant. No suit for this penalty had been instituted at the time of the adjudication in bankruptcy, and it is therefore contended by petitioner that the right to set-off did not become available to defendant upon reduction of the claim for the penalty to judgment.

> "The right to set-off is governed by the state of things existing at the moment of insolvency, not by conditions thereafter arising, * * * or by any subsequent action taken by either party to the transaction."
>
> Davis v. Elmira Savings Bank, 161 U. S. 275, 290, 40 L. Ed. 700;
> Yardley v. Philler, 167 U. S. 344, 360, 42 L. Ed. 192;
> Dakin v. Bayley, 290 U. S. 143, 148, 78 L. Ed. 229.

(b) **No mutuality of debt or credit.**

Petitioner contends that the State Supreme Court, in allowing defendant to apply the judgment or penalty against the debt of the bankrupt to the defendant, ignored the substantive requirement that the demands shall be mutual in quality.

> "To authorize a set-off there must be mutual credits or mutual debts."
>
> Libby v. Hopkins, 104 U. S. 303, 26 L. Ed. 769.

> "To be mutual debts between the parties must be owing to and be due in the same rights and capacities.".
>
> Collier on Bankruptcy (13th Ed.), p. 1607.

As stated by this Court in **Dakin v. Bayly**, 290 U. S. 143, 146, 78 L. Ed. 229, 232, the question for determination is:

> "Were the cross demands of the parties of the same quality, or, to state it otherwise, did each claim from the other in the same right?"

That there is no mutuality of right is apparent, we believe, from the fact that under repeated holdings of this Court, beginning with **Barnet v. Muncie Nat'l Bank**, supra, this Court has held that the borrower, when sued by a national bank, cannot have usurious interest paid applied as a credit upon or set-off against the principal indebtedness.

> "Set-off can be allowed only in actions founded upon demands which could themselves be the subject of set-off."
>
> 57 C. J. 379.

> "The cardinal principle in the rule of equitable set-off is mutuality of claims, **and the right of the parties**

seeking the set-offs to maintain an action to recover the fund sought to be set off." (Emphasis ours.)

Helms v. Citizens Bank of Erwin (Tenn. Ct. of Appeals), 97 S. W. (2d) 665.

Counsel for defendant argue, on page 6 of their brief, that the claims are mutual, because the penalty sued for grows out of the bankrupt's indebtedness to the bank. Thus it is said:

"The bank's claim is a provable debt, and **the penalty sued for having grown out of the bankrupt's indebtedness to the bank**, the claims are mutual." (Emphasis ours.)

And, again:

"The excess interest in this case was taken upon the indebtedness of the bankrupt to the bank, and manifestly the claims are mutual and **grew out of the same transaction.**" (Emphasis ours.)

Counsel for defendant cite no authority to support this proposition.

No holding has been found to the effect that, under Section 68 of the Bankruptcy Act, a claim in contract may be set off against a tort claim asserted by a trustee in bankruptcy. The contrary is held in the comparatively recent case of **Irving Trust Co. v. Altman** (City Ct. of N. Y., 1933), 276 N. Y. S. 781.

In an action by a trustee in bankruptcy to recover money paid as commissions under a contract invalid under the New York penal law, the defendant cannot set off an indebtedness growing out of a deficiency judgment against the bankrupt, because such indebtedness is not in the same

right and does not fall within the provisions of Section 68 of the Bankruptcy Act.

Palmer v. Doull Miller Co. (D. C. N. Y.), 233 Fed. 309.

The liability of a director of a corporation for excess indebtedness falls within the same reasoning that applies to an unpaid stock subscription, and is a trust fund for the benefit of all the creditors, ratably.

In re La Jolla Lumber & Mill Co. (D. C.), 243 Fed. 1004.

A stockholder is not entitled to set off his claim upon a corporation against his indebtedness for an unpaid subscription to its capital stock, and this principle controls the instant case.

Sawyer v. Hoag, 17 Wall. 610, 21 L. Ed. 731;
Scoville v. Thayer, 105 U. S. 143, 26 L. Ed. 168.

Money fraudulently received by a stockholder to retire his stock may not be set off against amounts paid by him after bankruptcy because of his guaranty of corporate notes.

Lytle v. Andrews (8 C. C. A.), 34 Fed. (2d) 252.

There was never any mutuality of debts between the bank and the trustee, nor, for that matter, between the bank and the bankrupt. The trustee never owed the bank anything. It would have been no different had the trustee deposited funds of the estate with the bank. There would then have been no right of set-off. The bankrupt had no right to set off the penalty against the indebtedness to the bank; and the bank had no right to apply the penalty as a

credit upon the bankrupt's indebtedness to it. It did not undertake to do so until judgment was rendered against it in favor of the trustee. Mutuality of debt and credit at the time of the filing of the petition, or at any other time, was lacking.

CONCLUSION.

It is therefore respectfully submitted that the decree of the Supreme Court of the State of Tennessee, entered June 4, 1937, upon opinion filed May 24, 1937, in the case of **C. C. McCollum, Trustee, v. Hamilton National Bank of Chattanooga,** should be modified and reversed by this Honorable Court in so far as it provides that the amount of the indebtedness of the bankrupt to defendant shall be applied as a set-off against or payment of the decree in favor of petitioner.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1937

No. 342

C. C. McCOLLUM, TRUSTEE IN BANKRUPTCY OF LOOKOUT PLANING MILLS,

Petitioner,

vs.

HAMILTON NATIONAL BANK OF CHATTANOOGA.

BRIEF OF HAMILTON NATIONAL BANK IN REPLY TO PETITION FOR CERTIORARI AND BRIEF OF PETITIONER.

SUBSTANTIAL FEDERAL QUESTION NOT INVOLVED.

Petitioner, C. C. McCollum, Trustee in Bankruptcy of Lookout Planing Mills, chose the Chancery Court, a State Court of Equity at Chattanooga, in which to bring this action for recovery of the penalty provided by the National Banking Act, United States Revised Statutes, Sections 5197, 5198, 12 U. S. C. A., Sections 85, 86 (R. 1, *et seq.*).

The Tennessee courts sustained the first ground of defendant's demurrer, and held that the Trustee in Bankruptcy was not the "legal representative" of the bankrupt, but that he was vested with power to maintain the suit by Section 70 of the Bankruptcy Act (R. 6, 10, 62, 74, 84).

Conforming to the method of pleading set-off in courts of equity in Tennessee, the Bank filed its answer as a cross-bill, praying that the $25,493.70 owing by the bankrupt to it be set off against any recovery for the penalty (R. 10 and 11).

American National Bank v. Warehouse & Elevator Co., 36 S. W., 960.

This suit was a direct action for the penalty, and the Chancellor awarded petitioner judgment for the penalty, amounting to $10,471.10, and set it off against the larger indebtedness of $25,493.70 owing by the bankrupt to the defendant Bank (Decree, R. 62, 63).

The Supreme Court of Tennessee affirmed the decree of the Chancellor in all respects (R. 82, 84).

Consequently, petitioner has successfully had his day in Court in a direct action for the penalty, and of that he does not complain. He seeks, however, a review of the final decree of the Supreme Court of Tennessee only in so far as that Court allowed set-off of the larger indebtedness of the bankrupt to the Bank against the judgment for penalty. The prayer of the petition is so limited by the following language:

"Wherefore your petitioner respectfully prays that certiorari be granted to review the decree of the Supreme Court of Tennessee * * * * * * * in so far as it provides that the amount of the indebtedness of the bankrupt to defendant shall be applied as set-off against the decree in favor of petitioner * * *."

It is thus admitted that the only question involved is the right of set-off, and no Federal question is presented for review within the terms of Section 237 (b) of the Judicial Code as Amended (28 U. S. C. A., Sec. 344-B).

STATE COURT, IN ALLOWING SET-OFF VIOLATED NO FEDERAL STATUTE OR DECISION.

(1) This suit, as aforesaid, was maintained under authority of Section 70 (a) of the Bankruptcy Act, which provided as follows:

"The trustee of the estate of a bankrupt, upon his appointment and qualification, and his successor or successors, if he shall have one or more, upon his or their appointment and qualification, shall in turn be vested by operation of law with the title of the bankrupt, as of the date he was adjudged a bankrupt, except that in so far as it is to property which is exempt, to all * * * * * * * (5) property which prior to the filing of the petition he could by any means have transferred or which might have been levied upon and sold under judicial process against him * * * * (6) rights of action arising upon contracts or from

the unlawful taking or detention of or injury to his property."
(11 U. S. C. A., Sec. 110).

By clause (5), the Trustee in Bankruptcy became vested with all assignable property and rights of action. Prior to the Bankruptcy Act rights of action for penalties and certain other rights of action were of doubtful assignability although arising from contracts or the unlawful taking of property. Therefore, clause (6) was added, making an action for the penalty an assignable right of action, and vesting the title of the bankrupt in the Trustee in Bankruptcy.

The following cases sustain the Supreme Court of Tennessee in holding that the Trustee in Bankruptcy can maintain a suit for the penalty:

National Bank of Jacksboro v. Lassiter, 196 U. S., 15, 49 L. Ed., 408;

Tiffany v. National Bank, 85 U. S., 409, 21 L. Ed., 862;

Read v. Am.-German National Bank, 155 Fed., 233;

Crocker v. First National Bank, 4 Dillon, 358; Fed. Cases, 3397;

Ripple v. Morgan, &c. Corp'n., 193 N. C., 422, 137 S. E., 156;

Monongahela National Bank v. Overholt, 96 Pa., 327.

Unless the Trustee had the right to maintain this action under the Bankruptcy Act the judgment for the penalty was void. If jurisdiction of the Court in this case rests upon Section 70 (a), the right of set-

off existed, and was allowable because these counter claims arose out of the same transaction and are mutual demands, subject to set-off under the Bankruptcy Act. Hence, no Federal rule was violated.

(2) Petitioner insists that the allowance of set-off conflicts with Section 68 of the Bankruptcy Act (11 U. S. C. A., Sec. 108), which provides:

> "(a) In all cases of mutual debts or mutual credits between the estate of a bankrupt and a creditor the account shall be stated and one debt shall be set off against the other, and the balance only shall be applied or paid.
>
> "(b) A set-off or counter-claim shall not be allowed in favor of any debtor of the bankrupt which (1) is not provable against the estate."

Gilbert's Collier on Bankruptcy (4th ed.), page 1142, Sec. 1426, says:

> "This Section does not create the right of set-off, but recognizes its existence and provides a method by which it can be enforced even after bankruptcy. The provision is permissive and not mandatory, and does not enlarge the doctrine, and may not be invoked in cases where the general principles of set-off would not justify it. The determination is within the discretionary control of the Bankruptcy Court, to be exercised in accord with general principles of equity."

This text is supported by the following cases:

Stanley v. Boylston National Bank, 229 U. S., 523; 57 L. Ed., 1313;

Cumberland Glass Mfg. Company v. DeeWitt, 237 U. S., 447; 59 L. Ed., 1042;

In Re, Yamini Dry Goods Co., 295 Federal, 733.

The Bank's claim is a provable debt, and, the penalty sued for having grown out of the bankrupt's indebtedness to the Bank, the claims are mutual. That being true, the Trustee in Bankruptcy would be duty-bound to set-off one claim against the other and the balance only applied or paid:

In Re, Boyce Dry Goods Co., 133 Fed., 100.

Consequently, the allowance of set-off was within the true intent and meaning of the Bankruptcy Act, rather than in conflict with it:

Cumberland Glass Mfg. Company v. DeeWitt, 237 U. S., 447; 59 L. Ed., 1042.

The petitioner contends that the action is in tort, and the judgment therefore is not a debt. If that contention is right, the judgment for the penalty is void and the Court was without jurisdiction.

It is, however, under the express terms of the National Banking Act (12 U. S. C. A., Sec. 86), "an action in the nature of an action of debt," and while it is true that it has been held in the cases of *Barnet v. Muncie National Bank*, 98 U. S., 555, 25 L. Ed. 212, and *Haseltine v. Central National Bank*, 183 U. S., 132, 46 L. Ed., 118, that usurious interest exacted by a National Bank cannot be set off against an action for the debt, there is no Federal rule of law or decision that defendant has been able to find forbidding set-off of an indebtedness against the penalty in a suit brought to recover the penalty. The excess interest in this case was taken upon the indebtedness of the bankrupt to the Bank, and, manifestly, the claims are mutual, and grew out of the same transaction.

The Supreme Court of Tennessee aptly and correctly disposed of that contention in its Opinion in this case, filed for publication but not yet published, as follows:

> "The complainant, having invoked the jurisdiction of a court of equity, will be required to do equity by having his claim credited on the larger one owing to the defendant (fol. 107). Counsel insists that since a debtor when sued by a national bank cannot offset same with the penalty provided by section 86 of the National Banking Act *(Barnet v. Muncie National Bank*, 98 U. S. 555, 25 L. Ed., 212; *Bank v. Hunter*, 109 Tenn. 91) that where the situation is reversed the bank should not be permitted to offset its debts against the penalty. There is an obvious distinction in the two cases. Section 86 of the Banking Act, being of a penal nature, is to be strictly construed. *Tiffany v. National Bank*, 18 Wallace, 409, 21 L. Ed., 862. The form of remedy for its enforcement is therefore exclusive. *Barnet v. Muncie National Bank, supra;* 25 C. J., 1185. It necessarily follows that the penalty can only be recovered in an independent action of debt, as directed in the act. Having obtained a decree for the penalty, there is no provision in the Banking or Bankruptcy Acts restricting or prohibiting the bank from offsetting same with any just debt owing to it by the bankrupt, and, as previously stated, this is expressly authorized by our statute." (R. 82).

The original indebtedness of petitioner to defendant was $45,000.00, of which, at the time of bankruptcy, an unpaid balance remained of $25,493.70. Within two years of filing of this suit for penalty the bankrupt has paid $5,235.55 excess interest. Thus

the unpaid balance of the original indebtedness was larger than the penalty at the time of bankruptcy (R. 56, 57, 62, 63). It seems, therefore, that allowance of set-off was equitable, was within the spirit of Section 68 of the Bankruptcy Act, and that no Federal question is involved.

(3) Set-off was properly allowed, under general principles of equity. Section 68 of the Bankruptcy Act applies general principles of equity to the right of set-off after bankruptcy.

Section 8768, Code of Tennessee, provides:

> "The defendant may plead by way of set-off or cross-action:
>
> "(1) Mutual demands held by the defendant against the plaintiff at the time of action brought, and matured when offered in set-off;
>
> "(2) Any matters arising out of the plaintiff's demand, and for which the defendant would be entitled to recover in a cross-action;
>
> "(3) Any matter growing out of the original consideration of any written instrument, for which the defendant would be entitled to recover in a cross-action."

The foregoing statute expresses the equitable policy of the State, and a Trustee in Bankruptcy who brings an action in the Chancery Court must do equity by allowing set-off in all proper cases:

Sartin v. Dixie Coal and Iron Company, 150 Tenn., 633.

In Re, Boyce Dry Goods Co., 133 Fed., 100;

In Re, Harper, 175 Fed., 412.

Having come into a Court of Equity, complainant must do equity. This principle is sustained by 24 R. C. L., 843, Section 48, as follows:

> "Equitable Set-off.—Bankruptcy and Insolvency statutes have generally permitted a set-off of mutual credits, whether due or not, and have, therefore, administered a much broader equity than the ordinary law of set-off, which does not generally permit a debt due at a future time to be set off in equity against a debt presently due. But a court of equity has power to permit an equitable set-off in cases not within the statute, if, from the nature of the claim or the situation of the parties, justice cannot be obtained by a cross-action. Thus where there are, upon accounts, mutual credits between two parties, though they cannot be set off at law, yet it is the common ground of a bill in equity. And it has frequently been held that set-off based on insolvency may be allowed in equity notwithstanding the claim of the defendant was not mature at the time of the commencement of the action. If both parties were solvent, so that both debts might ultimately be collected, the law would afford adequate relief, and no injustice would be wrought to either party. The one could not suffer by having to pay his own debt according to his contract, if he could ultimately compel the other to pay his debt according to his contract. But it is this very fact that, if the one pays the debt due from him, he cannot compel payment of the debt due him, and will thereby suffer irreparable loss, and his inability to protect himself by set-off at law because his debt is not due, that create his equity, and the necessity for equitable relief."

This text is supported by the following cases:

Schuler v. Israel, 120 U. S. 506, 30 L. Ed., 707;
Nashville Trust Co. v. Nashville Fourth National Bank, 91 Tenn., 336.

These claims arose out of the same transaction.

In all such cases, according to the almost universal rule, the right of set-off or recoupment existed. In 24 R. C. L., 844, Section 49, that rule is stated as follows:

> "The usual provision of the codes is that a counter-claim may consist of a demand arising out of the contract or transaction set forth in the complaint as the foundation of the plaintiff's claim, or connected with the subject of the action; and in an action arising on contract, any other cause of action arising also on contract and existing at the commencement of the action. The clear intention of the framers of the codes was that the court in one action should settle all matters in controversy relating to the contract or transaction which is the foundation of the suit. Any cause of action, therefore, whatever its nature, arising out of the cause of action alleged in the complaint, or connected therewith, in favor of the defendant, and against the plaintiff, is a proper counter-claim. Any other construction would frequently defeat the ends of justice by preventing a full examination of the matter in controversy, where the rights of the parties were so dependent upon each other that they must necessarily be considered together to render a correct judgment. When the cause of action arises out of the transaction or is connected with the subject of the action, it may be pleaded as a counter-claim without regard to its character,

and it is only where the causes of action sought to be counter-claimed arises upon an independent contract that it becomes material that the cause of action so sought to be counter-claimed should be one on contract and existing at the time of the commencement of the action."

(4) After the penalty has been reduced to judgment certainly it is subject to set-off. In 13 R. C. L., page 675, it is said:

> "So a judgment in favor of the receiver of a corporation against a National Bank for twice the amount of interest unlawfully taken by the Bank, is subject to a set-off, in favor of the Bank, of judgments thereafter recovered by the Bank on the note on which the usurious interest was taken."

This rule is sustained by the case of *Barbour v. National Exchange Bank*, 50 Ohio State, 90, 20 L. R. A., 192, wherein it is said:

> "But, after the appointment of a receiver, the respective demands of the Bank and Shoe Company were put into judgment, and thereafter they stood on a level as the subjects of equitable set-off, whether arising on contract, or growing out of a forfeiture or penalty. * * * * * * *
>
> "Any defense or set-off which the debtor might have urged in an action brought against him by the corporation itself may still be made in an action brought against him by the receiver. High on Receivers, Sec. 318. The Shoe Company, at and from the appointment of the receiver, was insolvent, and if, before the receivership, the Shoe Company, while thus insolvent, had sued the Bank to recover the penalty for taking excess

> interest, and if the Bank could not then have had the right of set-off under the statute, yet on just and equitable grounds, and upon a proper valuation of the Bank's claims not matured, we think the Bank would have been entitled to an equitable set-off against the claim of the Shoe Company; nor would such an equity in favor of the Bank have ceased to exist because afterwards a receiver came in to wind up the affairs of the insolvent Shoe Company."

The penalty was reduced to judgment in this suit. The requirement of the Banking Act as to form of the suit has been met. The judgment became, even if the right of action had not before been, an asset of the bankrupt estate, subject to set-off against the claim of defendant Bank. The debt was set off against the judgment for the penalty. The fact that the set-off was allowed in the suit for the penalty by cross-action is not material. If judgments for the penalty and for the debt had been obtained in different courts, or in the same court in different suits, certainly one judgment could be set off against the other. Then, what good reason can be assigned why set-off by cross-action may not be allowed?

(5) The right of set-off against a penalty exists by the express statute of Tennessee. Section 8769, Code of Tennessee, provides:

> "Mutual debts, though of a different nature, between the parties to a suit; or between testator or intestate of both or either party, may be set off against the other by being pleaded in bar or in discharge of the action, either wholly or in part, as the case may be, and if either debt arose

by reason of a penalty the sum intended to be set off, shall be pleaded in bar, setting forth what is justly due on either side."

This statute (the Code is a statutory enactment) should be, and is, controlling.

Petitioner elected to sue in the State Court, and is subject to State laws, in the absence of conflict with Federal laws. He who enters a court of equity must do equity, and the doing of equity does not conflict with Federal law or decisions.

Therefore, no substantial Federal question is presented by the petition for certiorari, and it should be denied.

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SUPREME COURT OF THE UNITED STATES.

No. 342.—October Term, 1937.

C. C. McCollum, Trustee in Bankruptcy of Lookout Planing Mills, Petitioner, *vs.* Hamilton National Bank of Chattanooga. | On Writ of Certiorari to the Supreme Court of the State of Tennessee.

[February 28, 1938.]

Mr. Justice Butler delivered the opinion of the Court.

Section 5197, Revised Statutes,[1] governs the rates of interest to be taken by national banking associations and § 5198[2] declares that the receiving of a rate of interest greater than that allowed, when knowingly done, shall be deemed a forfeiture of the entire interest and provides that, in case a greater rate has been paid, the person paying it may recover back twice the amount, in a suit in the nature of an action of debt. Petitioner is trustee in bankruptcy of Lookout Planing Mills, a corporation. He brought this suit under § 5198 in the chancery court of Hamilton County, Tennessee, to recover from respondent the penalty imposed by that section. Respondent answered denying liability, and by cross-bill alleged the bankrupt owed it $25,493.70 on notes, and prayed that it be allowed to set off its claim against any judgment that petitioner might obtain. Petitioner's answer to the cross-bill asserted that recovery of the penalty did not depend on payment of the debt.

The chancellor found that the bankrupt paid and respondent knowingly received $5,235.55 as interest based on a rate in excess of that permitted and gave him judgment for double that amount.

[1] 12 U. S. C., § 85.

[2] 12 U. S. C., § 86: "The taking, receiving, reserving, or charging a rate of interest greater than is allowed by the preceding section, when knowingly done, shall be deemed a forfeiture of the entire interest which the note, bill, or other evidence of debt carries with it, or which has been agreed to be paid thereon. In case the greater rate of interest has been paid, the person by whom it has been paid, or his legal representatives, may recover back, in an action in the nature of an action of debt, twice the amount of the interest thus paid from the association taking or receiving the same: Provided, That such action is commenced within two years from the time the usurious transaction occurred."

He ruled that after judgment petitioner's claim was subject to set-off and ordered that the amount awarded him be applied as a credit upon the debt. The state supreme court held the set-off permissible under the Bankruptcy Act, § 68 (a), and expressly authorized by § 8769 of the Tennessee Code and declared that petitioner would be required to do equity by having his claim credited on the larger one owing to the respondent by the bankrupt.

The question is whether respondent is entitled to have the amount of the judgment for penalty credited on its claim against the bankrupt estate.

When the bank knowingly received illegal interest, it immediately became liable for, and the borrower became entitled to recover from it, a penalty of twice the amount of the interest thus paid. *Farmers etc. National Bank* v. *Dearing,* 91 U. S. 29. *Lake Benton First National Bank* v. *Watt,* 184 U. S. 151. Upon petitioner's appointment as trustee in bankruptcy, the bankrupt's right to recover the penalty vested in him. Bankruptcy Act, § 70 (a), 11 U. S. C. § 110 (a). *First National Bank* v. *Lasater,* 196 U. S. 115, 118. *Reed* v. *American-German National Bank,* 155 Fed. 233. The penalty is to be enforced according to the terms of the statute. Guilt being established, the law itself fixes the punishment at precisely twice the usurious exaction paid; it may not be enhanced or mitigated because of aggravating circumstances or equitable considerations. As the sum demanded is certain, recovery in an action of debt is authorized, though the claim arises not in contract but in tort. *Chaffee & Co.* v. *United States,* 18 Wall. 516, 538. The liability can only be enforced in an action "brought specially and exclusively for that purpose,—where the sole issue is the guilt or innocence of the accused, without the presence of any extraneous facts which might confuse the case". *Barnet* v. *National Bank,* 98 U. S. 555, 559. One paying a national bank usurious interest and entitled to enforce the penalty may not recover it by way of set-off in a suit brought upon his note to the bank. *Haseltine* v. *Cent. Bk. of Springfield,* 183 U. S. 132, 137. *Barnet* v. *National Bank, supra. Dreisbach* v. *National Bank,* 104 U. S. 52. *Stephens* v. *Monongahela Bank,* 111 U. S. 197. See *Schuyler Nat. Bk.* v. *Gadsden,* 191 U. S. 451, 456.

Reasons, at least as cogent as those that uphold that rule, support the contention that the state court erred in permitting re-

spondent to credit the amount of petitioner's judgment for penalty upon the notes given it by the bankrupt. To allow respondent to satisfy the judgment for penalty by mere deduction from its claim against the bankrupt's estate is to detract from the punishment definitely prescribed. The sentence specifically required by the law may not be cut down by implication, set-off or construction; for that would narrow the statute and tend to defeat its purpose. See *United States* v. *Wiltberger,* 5 Wheat. 76, 95. *Fasulo* v. *United States,* 272 U. S. 620, 628.

The right of set-off here involved does not at all depend upon the Tennessee statute upon which, at least in part, the state supreme court rested its ruling. Sections 5197 and 5198, Revised Statutes, define petitioner's right to recover, and respondent's liability for, the penalty; the Bankruptcy Act governs liquidation and distribution of the bankrupt's estate. It results that the validity of the challenged provision of the decree depends upon the right of set-off in bankruptcy. Bankruptcy Act, § 68 (a), 11 U. S. C. § 108 (a). Cf. *Yates* v. *Jones National Bank,* 206 U. S. 158, 179. *Farmers etc. National Bank* v. *Dearing, supra. McDaniel National Bank* v. *Bridwell,* 74 F. (2d) 331.

Section 68 (a) declares: "In all cases of mutual debts or mutual credits between the estate of a bankrupt and a creditor the account shall be stated and one debt shall be set off against the other, and the balance only shall be allowed and paid." The words "debts" and "credits" as there used are correlative. What is a debt on one side is a credit on the other. *Libby* v. *Hopkins,* 104 U. S. 303, 309. Liability for the penalty does not arise in contract but is laid *in invitum* as a disciplinary measure. Nor does the judgment determining the extent of guilt and declaring sentence change the liability for penalty to one for debt. *Chase* v. *Curtis,* 113 U. S. 452, 463-464. *Boynton* v. *Hall,* 121 U. S. 457, 465-466.

As the penalty may be enforced only in a suit brought exclusively for that purpose so that the trial of guilt or innocence may not be embarrassed by any other question, it is plain that the payment of any debt owed by the plaintiff to the bank may not be held a condition precedent to the determination of that issue. Punishment for usury does not depend upon payment of the borrower's debt. It follows that respondent is not entitled to satisfy petitioner's judgment by deducting the amount of it from re-

spondent's claim against the bankrupt's estate. *Meredith* v. *Bank*, 127 Tenn. 90, 94. *Exeter Nat. Bank* v. *Orchard*, 43 Neb. 579, 582. *Morehouse* v. *Second National Bank*, 37 Hun 628. Reason, well supported by authority, requires that the penalty for usury so specifically prescribed shall be paid according to the terms of the statute.

Reversed.

Mr. Justice CARDOZO took no part in the consideration or decision of this case.

A true copy.

Test:

Clerk, Supreme Court, U. S.

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